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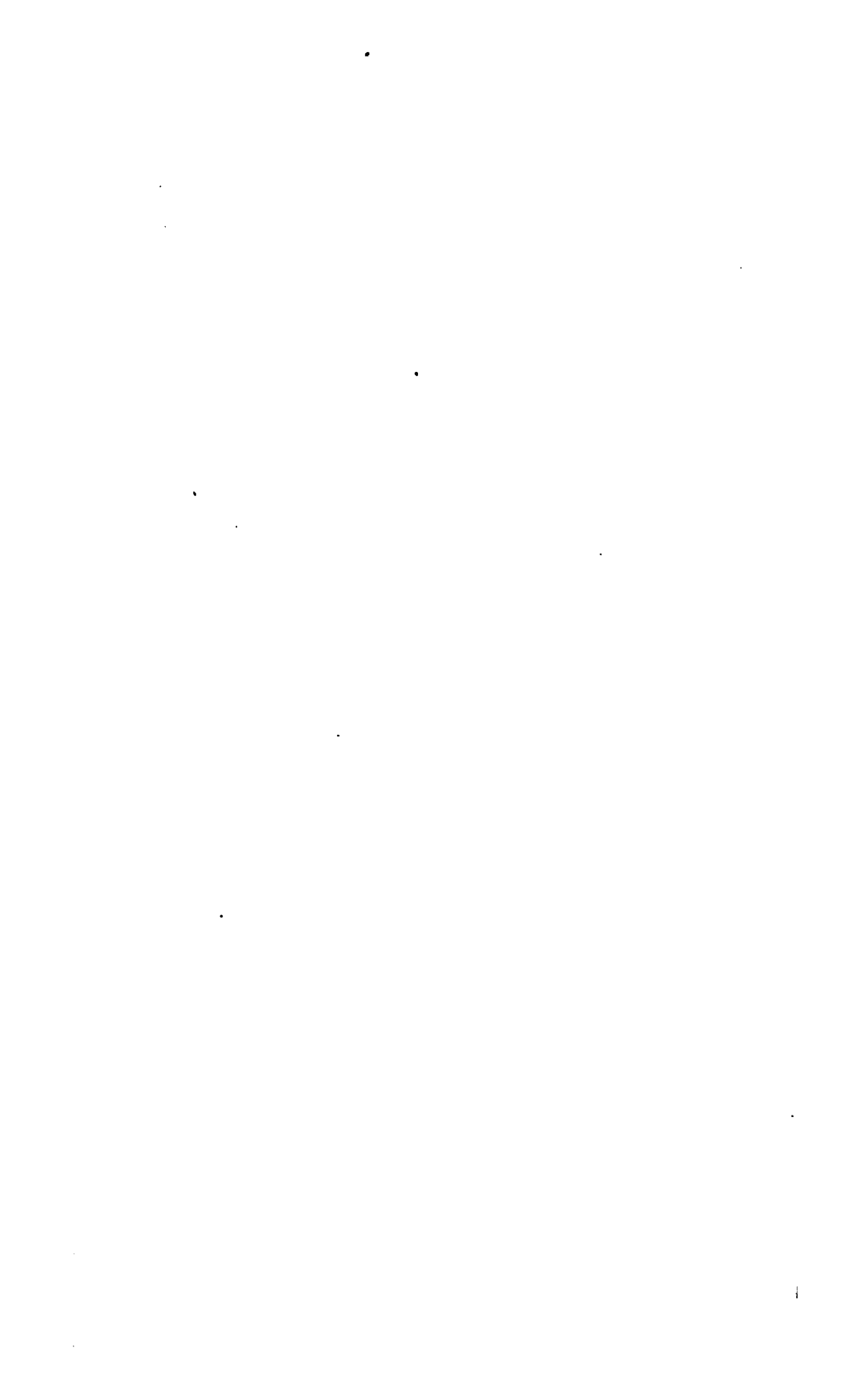
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CASES
ARGUED AND DETERMINED
IN THE
CIRCUIT AND DISTRICT COURTS
OF THE
UNITED STATES
FOR THE
SEVENTH JUDICIAL CIRCUIT.

BY
JOSIAH H. BISSELL,
OF THE CHICAGO BAR,
OFFICIAL REPORTER.

VOL. VI.—1874-1876.

CHICAGO:
CALLAGHAN AND COMPANY.
1876.

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JUDGES,
SITTING IN THE SEVENTH CIRCUIT DURING THE PERIOD
COVERED BY THIS VOLUME.

HON. DAVID DAVIS,
ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED
STATES.
Allotted to the Seventh Circuit. Appointed December 8, 1862.

HON. THOMAS DRUMMOND,
CIRCUIT JUDGE FOR THE SEVENTH CIRCUIT
Appointed Demember 22, 1869. District Judge since Feb-
ruary 19, 1850.

HON. SAMUEL H. TREAT,
DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF ILLINOIS.
Appointed March 3, 1855.

HON. WALTER Q. GRESHAM,
DISTRICT JUDGE FOR THE DISTRICT OF INDIANA.
Appointed December 21, 1869.

HON. HENRY W. BLODGETT,
DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ILLINOIS.
Appointed January 11, 1870.

HON. JAMES C. HOPKINS,
DISTRICT JUDGE FOR THE WESTERN DISTRICT OF WISCONSIN.
Appointed July 9, 1870.

HON. JAMES H. HOWE,
DISTRICT JUDGE FOR THE EASTERN DISTRICT OF WISCONSIN.
Appointed December 11, 1873. Resigned January 1, 1875.

HON. CHARLES E. DYER,
DISTRICT JUDGE FOR THE EASTERN DISTRICT OF WISCONSIN.
Appointed February 10, 1875.

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CASES
ARGUED AND DETERMINED
IN THE
CIRCUIT AND DISTRICT COURTS
OF THE
UNITED STATES.
SEVENTH JUDICIAL CIRCUIT.

THE HARRIET ANN.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.
FEBRUARY, 1874.

IN ADMIRALTY.

1. LACHES IN ENFORCING LIEN.—A seaman's lien for wages will not be enforced in admiralty, as against a *bona fide* purchaser, after the lapse of two seasons. Such a claim has become "stale."

2. Though courts of admiralty are not governed by any absolute rule of limitations, they will never do injustice to *bona fide* purchasers by the enforcement of old secret liens.

This was a libel, filed April 3, 1873, by Ole M. Nelson, against the scow Harriet Ann, for seaman's wages during the years 1869, 1870 and 1871. The vessel was owned by John A. Nelson, who was also her captain. In the spring of 1870, quite expensive repairs were made on the vessel, the money to pay for which was obtained from Amos J. Snell and Clark Lipe, to whom Nelson gave a mortgage for their advances. The libellant worked upon the vessel as a seaman a part of the season of 1870, for which he seems to have been fully paid.

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In the spring of 1871, Snell and Lipe became owners of the vessel and received a bill of sale of her, which was duly recorded, although Capt. Nelson retained a right to purchase her at a stipulated price during the season of 1871, a right, however, which he never exercised. During the season of 1871, Capt. Nelson continued master of the vessel, and libellant worked upon her as mate from the 24th of August to the close of navigation, for which there is a balance of wages due him. Libellant was fully aware of the advances made by Snell and Lipe and of the final purchase of the vessel.

When Snell and Lipe purchased the vessel, she was represented to them to be free and clear of all liens and incumbrances.

Brandt & Hoffman, for libellant.

John C. Richberg, for scow Harriet Ann.

BLODGETT, J.—Libellant now claims a lien on the vessel for all the wages earned by him for the seasons of 1869, 1870 and 1871, inclusive, which amounts in the aggregate, as his proof shows, to about \$560.

There is no statute of limitations applicable to this class of actions. Seamen are said to be the wards of a court of admiralty, and their lien upon the vessel for wages is always recognized and enforced, when the aid of the court is invoked in apt time. What lapse of time shall make a claim for wages, or any maritime lien, "*stale*," must depend so greatly upon the facts in each case that no general rule can be laid down which can be applied in all cases. The courts will always see to it that injustice be not done to subsequent *bona fide* purchasers and incumbrancers, by the enforcement of old secret liens. In this district, my learned predecessor has uniformly refused to enforce liens of this character after the lapse of two seasons. Substantially the same rule was applied by the learned judge for the Eastern District of Michigan, in the case of *The Propeller Dubuque*, 2 Chicago Legal News, 381;

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and in the case of *The Key City*, 14 Wallace, 653, the Supreme Court says, p. 660, "While courts of admiralty are not governed in such cases by any statute of limitation, they adopt the principle that *laches* or delay in the judicial enforcement of maritime liens, will, under proper circumstances, constitute a valid defense.

"Where the lien is to be enforced to the detriment of a purchaser for value, without notice of the lien, the defense will be held valid under shorter time, and a more rigid scrutiny of the circumstances of the delay, than when the claimant is the owner at the time the lien accrued."

Tested by these rules, it seems to me libellant's earnings for the years 1869 and 1870, if anything remains unpaid which was earned in 1870, must be deemed a "*stale*" claim as against this vessel. No good reason is shown why the wages earned in 1869 were left unpaid, and those earned in 1870 were paid or nearly paid. Indeed there is some proof tending to show that there was an indebtedness between libellant and the owner of the vessel upon which these wages might have applied. Libellant is not shown to have been a man of much pecuniary means or able to do without these earnings.

A different rule, I think, should apply to the earnings of 1871. Snell & Lipe had then become the owners of the vessel, and were bound to see the wages paid. The captain was their agent, and the wages, while a lien on the vessel, became their debt.

A decree will therefore be entered for the wages of 1871, and a reference made to a commissioner to take proof as to the amount of such wages.

In a recent case in the Eastern District of Michigan, *The Scow Melissa*, reported in 6 Chicago Legal News, 271, it is held that, in order to maintain the defense against a claim as *stale*, it must be alleged and proved that respondents were purchasers in good faith, for a valuable consideration, and without notice of the existence of the claim.

In the case of *The Hercules* reported in VII Chicago Legal News, 419, Judge Brown in the Eastern District of Michigan, held that creditors of a

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vessel plying upon the lakes must enforce their liens, as against *bona fide* purchasers without notice, during the current season of navigation, or within such reasonable time after the commencement of the new season as might be necessary to arrest the vessel; but that the circumstances of the case would frequently vary the rights of the respective parties.—[Reporter.

JAMES G. FLANDERS, ASSIGNEE, vs. MATILDA O. ABBEY, *et al.*

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—FEBRUARY, 1874.

IN EQUITY.

1. JURISDICTION.—The United States Circuit Court has jurisdiction of a bill by an assignee to recover money or property of the bankrupt preferentially or fraudulently conveyed.

2. CHARGING ESTATE OF MARRIED WOMAN.—In Wisconsin a married woman, by simply indorsing a note, does not create a liability which can be enforced against her separate estate, nor one upon which a personal judgment will be rendered against her.

Davis & Flanders, for complainant.

I. Where a court of equity has concurrent jurisdiction with a court of law, it will retain jurisdiction of a case if there is not a plain and adequate remedy at law, or if the question of fraud is involved. *Smith vs. Buchanan*, 4 National Bankruptcy Register, 133; *Buchanan vs. Smith*, 7 do., 513; *Warren vs. Delaware, Lackawanna & Western R. R. Co.*, 7 do., 451; *Warren vs. Tenth National Bank*, 7 do., 487, 488; *Garrison vs. Markley*, 7 do., 246.

II. There was no adequate remedy at law. Willard's Equity Jurisprudence, 651. *Todd vs. Lee*, 15 Wisconsin, 365; *Todd vs. Lee*, 16 do., 480; *Yale vs. Dederer*, 18 New

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York, 265; *Yale vs. Dederer*, 22 do., 450; *Phillips vs. Graves*, 20 Ohio State, 371; *Corn Exchange Ins. Co. vs. Babcock*, 42 New York, 613.

III. The question of fraud was involved.

IV. The knowledge of the husband is knowledge of the wife in matters pertaining to wife's property when the husband manages it.

Finches, Lynde & Miller, for defendant.

Howe, J.—This is a demurrer to a bill in equity brought by plaintiff as assignee of Little & Fyler, bankrupts.

The bill alleges that in February, 1871, Little executed a note for \$2,000, and procured it to be indorsed by the defendant, Matilda O. Abbey, the wife of defendant, D. C. Abbey, and "by such indorsement charged her own individual and separate estate for the payment thereof;" that the note was subsequently "passed" to the defendant bank; that within two months of the adjudication of bankruptcy, all the defendants and the bankrupt Little confederated together for the purpose of obtaining a fraudulent preference over the creditors of the bankrupt, and, in execution of that purpose, obtained \$2,000 from the sale of property of the bankrupts, and paid the same to the defendant bank, and took up the note; that the bankrupts were at that time insolvent, and that all the defendants knew them to be so; that the note was so paid before maturity; that the defendant bank knew that the money was obtained from the property of the bankrupts; that it was paid to and received by it to prevent its going into the hands of the assignee, for the purpose of obtaining a fraudulent preference and to defeat the provisions of the bankrupt act.

The bill further avers that defendant, D. C. Abbey, was in the employment of the bankrupts when these acts were committed, and was at the same time the agent of his wife in all the transactions; that defendant Matilda "has of her own

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separate estate, independently of her said husband, certain property and estate in the city of Milwaukee, Wis., which said property and estate, she, the said Matilda, charged with the payment of the note hereinbefore mentioned."

The relief prayed is that the plaintiff may be decreed to be entitled to the said sum of \$2,000, and that the defendant bank and defendant Matilda be decreed to pay it to him, and for general relief.

Each of the defendants files a separate demurrer.

The causes of demurrer assigned are:

1. That plaintiff has complete remedy at law.
2. That plaintiff has joined several distinct matters in his bill.

3. Multifariousness: that defendant, D. C. Abby, is not properly a party, no relief being prayed against him.

4. That plaintiff, as to defendant, Matilda, has not stated such a case as can constitute a proper or legal charge upon her separate estate.

1. As to the alleged want of equity in the bill, as against all the defendants. The substance of the bill in this respect is that the acts of the defendants in obtaining from the property of the bankrupts the money and applying it in the payment of the note due to one of them and indorsed by the other, under all the circumstances, was a fraudulent act, both as to the other creditors and as to the bankrupt act itself.

It is a well-settled rule that courts of equity possess a general concurrent jurisdiction with courts of law in cases of fraud cognizable in the latter; and exclusive jurisdiction in cases of fraud beyond the reach of the courts of law.¹

In cases of alleged fraud, courts of law and equity have a concurrent jurisdiction, and the party may apply to one or the other, at his option.²

¹ 1 Story Equity Jurisprudence, § 184.

² *Goss vs. Lester*, 1 Wisconsin, 53.

Flanders *vs.* Abbey.

Section 2 of the bankrupt act gives this court jurisdiction of all suits in law or equity, which may be brought by the assignee touching any property or rights of property of the bankrupt, transferable to or vested in such assignee.

This section leaves the jurisdiction as between the two courts as it was at the time of its passage. It does not enlarge the equity powers of the court, but leaves them as they were before. Whenever, then, any proper party would be entitled to invoke the aid of an equity court, the assignee in bankruptcy, by virtue of this section, has the same right, upon the same facts. The allegations of fraud confer the power upon the equity court in both cases.

These principles were applied by Judge Lowell, of the District Court of Massachusetts,¹ in the case of a suit in equity by the assignee of a bankrupt to set aside a voluntary conveyance of land, where the fraud alleged was an attempt to delay and hinder creditors; to a suit in equity by an assignee to set aside mortgages of personal property, where the fraud alleged was a design to give the mortgagee a preference over creditors of the bankrupt, by Justice Clifford in Circuit Court for the District of Maine;² to a suit in equity by an assignee to recover the proceeds of goods sold under judgment in a state court against the bankrupt, taken by confession, where both parties knew of the insolvency.³ These proceeds were money in the possession of the bank, and a suit at law was a plain, simple and adequate remedy.

I think these cases dispose of the demurrer, and that it must be overruled as to the defendant bank.

II. The demurrer as to the other defendants raises an entirely different question. Is the plaintiff entitled to any relief

¹*Pratt, Jr., vs. Curtis*, 6 Bankruptcy Register, 189.

²*Sammon vs. Cole*, 5 Bankruptcy Register, 257.

³*Traders' Bank vs. Campbell*, 14 Wallace, 87.

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as to the defendant Matilda and her husband upon the facts stated in the complaint? We have already shown that the foundation for the claim for relief against her is the indorsement by her of the paper of the bankrupts—for their accommodation. It is not alleged that it was in any manner for the benefit of her separate estate, or that she received any consideration for the act. The bankrupts wanted to borrow money. They were unable to do it upon their own credit. She executed no paper or instrument, creating any express charge upon her estate. The bill alleges that she charged her separate estate, "by such indorsement." After the indorsement, and probably because of it, it was taken by the defendant bank. At law, independent of any statute of this state, such an indorsement would be void, creating no liability against the *feme covert*. The effect of the Wisconsin statute of 1850 (the only one that can affect this question) conferring certain powers upon married women, has been several times before the Supreme Court of this state. It was finally held, in *Conway vs. Smith*, 13 Wisconsin, 125, that the contracts of a married woman, when necessary or convenient to the proper use and enjoyment of her separate estate, were binding in law.

But the same court held, in *Todd vs. Lee*, 15 Wisconsin, 365, that all her other engagements stood as before the passage of the act, good only in equity. The change from an equitable to a legal estate has not in respect to them enlarged her power, or removed the disability of coverture, but she remains as if still possessed of an estate in equity, without restriction as to her power of disposition.

The only question, then, is: Will the *feme covert* by the indorsement of this note, create such a debt or incur such a liability that a court of equity will make it a charge upon her separate property? Different rules have been applied to such facts by the leading equity courts of this country and those in England. The English rule has been broader than

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that usually enforced here. There they have applied the separate estate of a *feme covert* to the payment of all her debts without inquiry into the purposes for which they were contracted. It was enough to know that she had contracted the liability; the court applied her estate to its discharge as fully as a court of law applied the property of any debtor to the payment of a judgment against him. The courts of New York went very far at one time in the same direction. Without stopping to make any examination of the many cases on this subject, it is sufficient now to remark that a more restricted rule has been generally applied by the courts of this country, and I think the true doctrine is that stated by the Supreme Court of Massachusetts, in the case of *Willard vs. Eastham*, 15 Gray, 328.

When, by the contract, the debt is made expressly a charge upon the separate estate, or is expressly contracted upon its credit, or when the consideration goes to the benefit of such estate, or to enhance its value, then equity will decree that it shall be paid from such estate, or its income, to the extent to which the power of disposal by the married woman may go. But when she is a mere surety, or makes the contract for the accommodation of another without consideration received by her, the contract being void at law, equity will not enforce it against her estate, without an express instrument making the debt a charge upon it.

Upon this point see also *Yale vs. Dederer*, 18 New York, 265; *Peake vs. La Baw*, 6 C. E. Green, 269; *Kim vs. Weipert*, 46 Missouri, 504.

If a court of equity will not enforce the liability created by that indorsement upon the separate estate of this defendant, it will be at once conceded that it will not make any decree against her personally. The only reason given for making her a party, is the fact of this indorsement. It is not alleged that she received the money from the bankrupt's property, with which the note was paid. That was paid to the bank.

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As no decree can be had against her, it follows that she was improperly made a defendant.

The only reason for making D. C. Abbey a defendant, is that he is the husband of Matilda, and that she could not be sued without joining him in the proceedings.

The demurrer must be sustained as to the defendants Abbey, without costs to either party, plaintiff to amend his complaint within ten days, if he so elects.

JOHN BULLENE vs. CELESTIN BLAIN.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—FEBRUARY, 1874.

1. NOTE GIVEN UNDER PRESSURE.—A note given to the agent of a creditor, under the threat of interference to defeat a proposed compromise, is void in the hands of the payee.

2. A SECRET AGREEMENT.—To pay one creditor or his agent a larger sum than was to be paid others, as a condition of accepting the compromise, is void, and if the creditor's agent was specially retained by the debtor to urge the compromise, any promise to pay the agent for such services is void.

3. EQUALITY IN COMPROMISE SETTLEMENTS.—It is the policy of the law to discourage all acts whereby one creditor obtains any advantage in the distribution of a debtor's estate, and if the agent of a creditor is authorized to accept compensation from debtors for securing compromises, in which compensation the creditor upon certain conditions was to share, no contract between the agent and the debtor for such compensation should be enforced.

This was an action of assumpsit on a promissory note for five hundred dollars made by the defendant, dated on the 23d day of January, 1872, payable to plaintiff in one year from date.

Plaintiff introduced the note and rested. Defendant offered

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evidence tending to show that in the early part of January, 1872, he was a merchant having stores in Chicago, Kankakee, and St Anne; that he became insolvent, and proceedings in bankruptcy were commenced against him in the district court of this district; that plaintiff was traveling collector for the firm of Peake, Opdyke & Co., of New York City, who were creditors of defendant to the amount of upwards of \$4,000; that defendant proposed to compromise with his creditors at forty cents on the dollar, giving time paper secured by an indorser; that plaintiff, as agent of Peake, Opdyke & Co., called on him, and after fully examining into his affairs, told defendant that if he would offer fifty per cent. he would advise his firm and other creditors to accept his proposition; that defendant accordingly offered fifty per cent., and after all the Chicago creditors had signed the composition deed, and it was either sent or about to be sent to New York for the signatures of creditors, the plaintiff told defendant he must pay him \$500, or he would prevent his firm from signing it; that he had only to telegraph the word "*fraud*" to his firm and it would stop all the New York creditors from signing; that, having no money, defendant gave the note in question, taking a receipt or stipulation from plaintiff, that the note should not be binding unless the compromise was effected at fifty per cent.; that a Mr. Colby, who represented certain Chicago creditors, took the active charge of the compromise, and was mainly instrumental in obtaining the consent of creditors to it, for which he claimed no compensation. Plaintiff then offered evidence tending to show that the note was given to compensate plaintiff for his services and influence in obtaining the compromise, and that no threats of preventing the compromise unless the note was given were made by him; that he spent much time in explaining the state of defendant's affairs to Chicago creditors; that he urged the compromise as a proper measure for the interest of all creditors, but did not disclose to the creditors he saw on the subject the fact that he was acting in defendant's interest, or was to receive any

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compensation from defendant in case the compromise was effected; that by the contract between plaintiff and his employers he had the right to assist debtors of the house in making compromises, for which he might receive pay, but the firm had the right, upon certain terms which he did not state, to the pay he so received, or a share of it; that when he took hold of the matter for defendant he promised to pay him \$1,500, if compromise was obtained, but after plaintiff insisted on his paying fifty per cent., defendant thought he ought not to pay over \$500.

Plaintiff also introduced a letter from defendant to plaintiff, written after the note was due, stating in substance that plaintiff ought not to urge payment immediately, because it was through plaintiff's "kind advice" that defendant had been compelled to pay fifty per cent. where he ought not to have paid over forty per cent.

Bentley, Swett & Quigg, for plaintiff.

Frederic Ullmann, for defendant.

BLODGETT, J., charged the jury: 1st. That if they believed from the evidence that the note was obtained from defendant by the threat of plaintiff to interfere and defeat defendant's proposed compromise unless defendant would give plaintiff this note as a bonus to him, then said note was void in the hands of plaintiff as against defendant.

2d. That, it being conceded by the counsel for plaintiff that a secret agreement to pay Peake, Opdyke & Co., a larger sum than was to be paid other creditors, as a condition of their accepting the compromise, would be void, the same principle should apply to their agent; and that, if they believed from the evidence that it was expected or understood between plaintiff and defendant, that plaintiff was not to disclose to other creditors the fact that he was specially retained by defendant, but was to urge the compromise on the ground of

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the general interest of all the creditors, and that it was all defendant was able to pay, and thereby give other creditors to understand that he was only acting in the interest of creditors, any promise by defendant to pay plaintiff for such services would be void, because of its tendency to mislead other creditors.

3. That it is the policy of the law to discourage all acts whereby one creditor obtains any advantage over another in the distribution of a debtor's assets; that if they believed plaintiff was, by his agreement with his firm, authorized to accept compensation from debtors for securing compromises in which the firm, upon certain conditions, were to share, the result of such an arrangement might be to give his firm an undue preference and advantage over other creditors, and no contract to that end between plaintiff and a debtor should be enforced in a court of justice.

Verdict for defendant.

In a recent case, *Edwin R. T. Armstrong vs. The Mechanic's National Bank of Chicago*, March, 1876, to appear in subsequent Volume of this Series, BLODGETT, J. ruled that, nevertheless, the debtor could not avoid the secret agreement to pay one creditor a larger sum than others, if the compromise or settlement were obtained by misrepresentations or fraud.—[Reporter.]

Main vs. Second National Bank of Chicago.

W. S. MAIN, ASSIGNEE, ETC. VS. SECOND NATIONAL
BANK OF CHICAGO.

DISTRICT COURT.—WESTERN DISTRICT OF WISCONSIN.—MARCH,
1874.

IN BANKRUPTCY.

1. JURISDICTION.—A national bank cannot be sued in the federal courts outside of the district where it is located. Service on the cashier when found within another district does not give jurisdiction.

2. *Manufacturers' National Bank vs. Baack*, 8 Blatchford, 187, approved.

3. The Practice Act of June 1, 1872, does not change this rule nor enlarge the jurisdiction of the federal courts.

Motion to dismiss for want of jurisdiction, the defendant being a national bank, located and doing business in the city of Chicago, State of Illinois, and service having been had upon John P. McGregor, the cashier, who was found within the district.

Tenneys, Flower & Abercrombie, for the motion, cited *Crocker vs. Marine National Bank of New York*, 101 Massachusetts, 240; *Cooke vs. State National Bank of Boston*, 50 Barbour, 339.

H. S. Orton and *W. F. Vilas*, contra.

HOPKINS, J.—In the argument filed in support of the motion, it is claimed that a national bank cannot be sued in any court out of the judicial district where it is "located" or "established." I do not think the general banking law admits of such an interpretation. The eighth section of the act of

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June 3, 1864,¹ provides that such corporations may sue and be sued in any court of law and equity as fully as natural persons.

I do not think the provision in the 57th section of the act restrictive of this general authority, but that it was intended rather to enlarge the operation of the 11th section of the Judiciary Act of 1789,² and to confer upon such organizations the right to sue and be sued in the federal courts in the district where located, by a citizen of the same district; and I fully concur with Judge Blatchford's views expressed in his opinion in the *Manufacturers' National Bank of Chicago vs. Baack*, 8 Blatchford C. C. R., 137, that the banks organized under the general banking act of Congress are to be deemed residents or inhabitants of the state and district where they are "located" and "established." The provisions of the act referred to by him are sufficient to warrant that conclusion, and if this were the only point I should have no hesitancy in overruling the motion.

But there is a question arising under the provision of the 11th section of the Judiciary Act of 1789, which, as interpreted by numerous decisions of the federal courts, seems to me to constitute an insuperable objection to the plaintiff's right to prosecute this defendant in this court.

That section provides that "no civil suit shall be brought before either of the courts (circuit or district) against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ."

That the defendant was not an "inhabitant" of this district when this suit was commenced, is too plain for discussion. The remaining question is, was the defendant found "here at that time?"

¹ 13 U. S. Statutes at Large, 101.

² 1 U. S. Statutes at Large, 73, 78.

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The defendant, as before stated, was "located" at Chicago; that was its habitation, which does not move around with the person of its officers. The corporation is not migratory. It could not, of its own will and without authority of the law, change its location to this state. Therefore, I must hold that this court has no jurisdiction over this defendant; that it was not "found" here, within the meaning of the statute. In the case of the *Bank of Augusta vs. Earle*, 13 Peters, 519, the court say, in speaking of locality of corporation: "It must dwell in the place of its creation, and cannot migrate to another sovereignty." This, it is true, was said of a state bank, but the same may with equal propriety be said of a national bank. They have a local habitation, an office, and place of business within a state or district, as well as a state bank. Justice Nelson, in *Day vs. Newark India-Rubber Manufacturing Co.*, 1 Blatchford, 628, and in *Pomeroy vs. New York and New Haven R. R. Co.*, 4 Blatchford, 120, examined this question very fully, and arrived at the conclusion in both cases, notwithstanding there was a statute of the state of New York authorizing service to be made upon officers of such foreign company within the state, which would give the state courts jurisdiction of the corporations, that the corporations were not "inhabitants" of the state, and were not "found" there because their officers and agents resided or came into that district; that the officers were not the corporations, and the corporations were not therefore found within the district.

This is a jurisdictional question, and "state laws can confer no authority on this court in the exercise of its jurisdiction, by the use of state process, to reach either persons or property which it could not reach within the meaning of the law creating it."¹

I do not think the Practice Act of June 1, 1872,² changes

¹ *Toland vs. Sprague*, 12 Peters, 328.

² 17 U. S. Statutes at Large, 197; Revised Statutes, 1874, 178.

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the rule. That relates to the practice and proceedings in suits against parties who may be prosecuted in the federal courts, but does not profess to enlarge their jurisdiction or to extend it over persons or cases not before within the cognizance of the court. As said in *Toland vs. Sprague*, 12 Peters, 330, "the acts of Congress adopting the state process, adopt the form and modes of service only so far as the persons are rightfully within the reach of such process, and did not intend to enlarge the sphere of the jurisdiction of the circuit courts."

I think the same construction should be given to the act of 1872 above-mentioned, and so construed it does not relieve the case of the question of the *habitat* of this defendant being without the district, and therefore not subject to the process of this court.

The motion is therefore granted, and this suit dismissed.

Since the above decision the jurisdiction of the United States Circuit Courts has been changed under the act of March 3d, 1875, 7 Chicago Legal News, 217, and the clause in the 11th section of the Judiciary act of 1789, above described, now reads "or in which there shall be a controversy between citizens of different states."—[Reporter.]

In re Miller.

In re MILLER.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—~~MARCH~~,
1874.

IN BANKRUPTCY.

CONFLICT OF JURISDICTION.

1. BANKRUPTCY COURT—WHEN SUPREME.—When the bankrupt law cannot be properly administered by the bankruptcy court, owing to the interference of a state court and its determination to adjudicate upon the rights of parties and property in the bankruptcy court, then the latter ought not to hesitate to assert its authority.

2. In questions under the Bankrupt Act, the federal and state courts are not independent, but the former are superior.

3. FRAUDULENT PREFERENCE.—The finding of a jury that the debtor had committed an act of bankruptcy by making a preference to a creditor in transferring property to him, was in this case substantially an instruction to the marshal to take possession of it, or a ratification of his act, and the marshal was authorized so to do.

4. STATE TRIBUNALS BOUND.—A decision by the bankruptcy court that a transfer was in fraud of the act is binding upon the state courts, and the creditor must come into the bankruptcy court to assert his rights as against such decision.

5. ENJOINING SUIT IN STATE COURT.—If, however, he sue the marshal and the assignee in trespass in a state court, the bankruptcy court may enjoin the parties to the suit.

E. A. Sherburne, for Baldwin, creditor.

George Herbert and Holmes, Rich & Noble, for the Marshal.

DRUMMOND, J.—A question of some practical importance was argued before me yesterday, which involves to some extent a conflict of jurisdiction between the state and federal courts. It is rather a peculiar case, and I am not aware that



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the same question has ever been presented before in any reported case.

The facts are that a petition in bankruptcy had been filed against one S. S. Miller. One of the grounds for adjudication was that he had been guilty of an act of bankruptcy in disposing of some of his goods two days before the filing of the petition, to one Baldwin, a creditor, with an intent to give a preference to him, and in fraud of the bankrupt act. The jury found the allegation to be true, and a decree in bankruptcy was entered against Miller. The effect of this decree was to establish that the sale to Baldwin was fraudulent as against the bankrupt law. A warrant had issued from the bankrupt court, and the property, which it had been claimed was sold by Miller to Baldwin, was taken by the marshal and turned over to the assignee, who sold it and now holds the proceeds.

Baldwin then brought an action of trespass in the Superior Court of Cook County against the marshal and the assignee, to recover damages for taking the property. The petition presented in the District Court asked for the interposition of the court in that suit in the state court, and set forth the above facts, and that Baldwin was a witness in the bankruptcy suit. There were also some affidavits filed, between which and the petition some discrepancies existed. The court on that petition made an interlocutory order restraining Baldwin and his attorneys from prosecuting the suit in the state court until further order.

On a motion to set aside this order, the whole question has been fully argued before me. The case is peculiar in this respect: that Baldwin was a witness in the bankruptcy proceedings, and in a certain sense appeared therein, and it was claimed that it was partly on his testimony that the adjudication was found against Miller. Although, therefore, he was not nominally a party to the bankruptcy proceedings, still, it is insisted he was really a party and had notice of those proceedings and of the adjudication. This being so, the question is whether it

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was proper for Baldwin under the circumstances and without leave of the bankruptcy court to commence, in the state court, a suit founded on the very sale of property in consequence of which an adjudication in bankruptcy was rendered. It was stated, in an affidavit filed, that the assignee was a party to the suit in the state court at the time of the granting of the injunctional order, but that the suit had since been dismissed as to him. This fact is relied upon by the counsel for Baldwin, as giving him a stronger standing in the state court. The suit being now only against the marshal, and not interfering with the property, and being for damages only, it is contended that Baldwin has a right to maintain his suit, although the assignee has the proceeds of the property.

An embarrassing question arises, because, it is said, all these facts have been presented to the state court, which has refused to consider them, and is determined to go on and render a judgment in the case. The question is, then, whether this was a proper proceeding on the part of Baldwin? I am inclined to think it was not, and, although it might be unpleasant to interfere with the state court, still, when the law could not be properly administered by the bankrupt court, owing to the interference of the state court and its determination to adjudicate on the rights of parties and property, as in this case, then the bankrupt court ought not to hesitate to assert its authority.

There seems to be an erroneous view prevailing among some of the bar and the public, that the state and federal courts are independent of each other in all questions of this kind—that when the state court is called on to yield, it is not consistent with its dignity to submit and allow itself to be overruled.

This is not so. The state and federal courts are one for some purposes and distinct for others. The general Government is supreme within its legitimate sphere, and this necessitates the state court yielding in such instances. Now the constitution gave power to Congress to pass a bankrupt law, and gives the bankrupt court the power over the rights and pro-

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perty of the citizens of the states, and the present law declares that certain proceedings in the state courts shall be of no effect.

For instance, the bankrupt act dissolves all attachment suits commenced within a certain time prior to bankruptcy proceedings, and vests the property attached in the assignee. This is done by virtue of the general power which is given to Congress to pass bankrupt laws. This law also puts an end to all insolvent proceedings under the laws of the states, and hence they are *ipso facto* rendered inoperative when bankruptcy proceedings are taken.

In the present case, then, under this state of things, what is the effect of bankruptcy proceedings? It is this: that this contract between Baldwin and Miller was declared a fraud on the bankrupt law, and inoperative as to creditors. Consequently, a decree in effect that this property belonged to the creditors, and that the assignee had a right to it under the fourteenth section of the bankrupt act—which declares that “all property conveyed by a bankrupt in fraud of his creditors shall pass to the assignee,”—was substantially by relation an instruction to the marshal to take possession of it. It can hardly be said to be like the case where a party prosecuting in the state court is an entire stranger to the bankruptcy proceedings.

The decree must be presumed to have been correct. It might be said that while the sale by Miller was a fraud on the creditors, still Baldwin was no party to it and that “if he did not have reasonable cause to believe that a fraud was intended, and that the debtor was insolvent,” the sale was good as to him. Who, however, is to decide this? It is admitted on all sides that this is a question which the federal court has the right to decide. This being a federal question, could an ultimate decision be rendered by the state courts? Was the assignee bound to follow Baldwin through every state court up to its highest tribunal, and so on to the Supreme Court of the United States, or must he come into the federal court and assert his rights. Either the case must go to the Su-

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preme Court of the United States under the 25th section of the Judiciary Act, or Baldwin must come into the federal court.

In the case of *Buck vs. Colbath*, 3 Wallace, 334, it was claimed that the marshal had improperly taken the property of "B." in an attachment suit in the federal court for the property of "A." There "B." was allowed to sue the marshal in the state court. In that case the Supreme Court put it on the ground that the question in the federal court was not as to the title to property between "A" and "B." But in the case now before the court that is the question, and the federal court has in one respect decided that the property was Miller's; and this it had a right to decide, as is said by the Supreme Court in the case of *Ex parte Christy*, 3 Howard, 292. In *Freeman vs. Howe*, 24 Howard, 450, it was decided that when the property is in the possession of the marshal it could not be interfered with by a process from the state court; and here the property was in effect in the possession of the court or its officers, and the maintenance of the action in the state court depends on the construction to be given to the bankrupt law.

It often happens that the federal and state courts decide differently between citizens of a state as to the rights of property, but here the federal court is, under the bankrupt law, the ultimate arbiter as to the construction of the bankrupt law, and by this the state courts are bound. This property must, therefore, come into the federal court to have rights determined. It is asked how Baldwin can have an appeal or writ of error. He has dismissed the suit against the assignee, but the assignee has the property or the proceeds, and Baldwin has a complete remedy for the value of the property taken against him; and an appeal or writ of error will lie, for the value of the property taken, in a suit against the assignee just as in any other case.

The order of the District Court is only temporary, and under the peculiar circumstances of the case I shall not at pres-

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ent interfere with it. If there are any facts which in the opinion of counsel may justify it, Baldwin can make application to the bankruptcy court to proceed with his suit in the State Court.

See further that an injunction will not be granted to stay proceedings in a suit instituted in a state court against the marshal for taking possession of property which did not belong to the debtor, under a warrant in involuntary proceedings; *In re Marks*, 2 Bankruptcy Register, 575.—[Reporter.

In re NATIONAL LIFE INSURANCE COMPANY OF
CHICAGO.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—APRIL,
1874.

IN BANKRUPTCY

1. JURISDICTION OVER CORPORATION IN HANDS OF RECEIVER.—The amendment of February 3, 1873, to the Bankrupt Act, does not deprive the bankruptcy courts of jurisdiction over a corporation of which a receiver had been appointed by a state court.

2. This amendment does not oust the federal courts of jurisdiction, but simply saves the acts done by the state court and receiver prior to the filing of the petition.

This was an answer to the petition in bankruptcy, in the nature of a plea to the jurisdiction.

The answer sets up that the petition was filed on the 14th of February, 1874, alleging non-payment of a death-loss of \$1,000; whereas, on the 15th of December, 1873, a bill was filed in the Circuit Court of Cook County, by the attorney.

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general, for the purpose of winding up the affairs of the company, and distributing its assets ratably, pursuant to the act of the General Assembly of March 11, 1869;¹ that in that suit a decree was subsequently made appointing Kirk Hawes receiver, with authority to take possession of all the assets of the company and divide the same among its creditors and those entitled thereto; that the receiver had taken full possession of the assets and property of the company in pursuance of such decree, and was proceeding to execute the decree and mandate of said court; wherefore respondent submits that this court has no jurisdiction to adjudge respondent a bankrupt.

Clarkson & Van Schaack, for petitioner.

Kirk Hawes, receiver, *pro se*.

BLODGETT, J.—This answer brings before the court for construction the act of Congress passed on the 3d of February, 1873, amendatory of the bankrupt act.

It is claimed that the state court having acquired jurisdiction of the debtor and its assets, under the laws of this state providing for winding up its affairs and distributing its assets, the amendment in question excepts the debtor from the operations of the bankrupt law, and leaves the debtor in the hands of the state courts.

Prior to the passage of this amendment the federal courts had uniformly held that the pendency of proceedings in the state courts to administer the affairs of an insolvent corporation did not prevent the federal courts from assuming full jurisdiction on a proper case made in bankruptcy.²

The language of the act in question is peculiar. It is as follows:

“*Be it enacted, etc.,* Whenever a corporation created by the laws of any state, whose business is carried on wholly

¹ Session Laws, p. 209.

² *In re Merchants' Insurance Company*, 3 Bissell, 162.

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within the state creating the same, and also any insurance company so created, whether all its business shall be carried on in such state or not, has had proceedings duly commenced against such corporation or company before the courts of such state for the purpose of winding up the affairs of such corporation or company and dividing its assets ratably among its creditors and lawfully among those entitled thereto, prior to proceedings having been commenced against such corporation or company under the bankrupt laws of the United States, any order made, or that shall be made, by such court, agreeably to the state law for the ratable distribution or payment of any dividend of assets to the creditors of such corporation or company, while such state court shall remain actually or constructively in possession or control of the assets of such corporation or company, shall be deemed valid, notwithstanding proceedings in bankruptcy may have been commenced and be pending against such corporation or company.”¹

It will be seen that it does not say that in case of proceedings in state courts the bankrupt court shall not take jurisdiction. It declares that all orders made by the state court agreeably to the state law for the ratable distribution or payment of dividends or assets, while such state court shall remain actually or constructively in possession of assets, shall be deemed valid. The phrase, “while the state court, by its receiver, is in possession of assets,” seems to imply that the state court may be divested of possession at some time by the proceedings in bankruptcy, and the language of the act only says that the orders of the state court for the payment of dividends, while so in the possession, shall be valid. That is to say, the court in bankruptcy shall not set aside the orders and decrees of the state court, and begin the administration of the estate *de novo*, but shall take hold where the state court leaves

¹ §5123, U. S. Revised Statutes, 1874.

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off, or where it finds the debtor at the time of adjudication.

It seems very clear to me that if congress had intended to divest the bankrupt courts of jurisdiction over this class of debtors it would have said so clearly and unmistakably. The courts had so expounded the bankrupt law at the time this amendment was passed as to hold that jurisdiction was conferred over this class of debtors, notwithstanding the pendency of winding up proceedings, and if it had been the intention to leave these corporations in the hands of the state courts exclusively, Congress would have said so.

Another consideration which has great weight with me on this point, is that fraudulent conveyances, gifts and preferences, which are prohibited by the bankrupt law, can only be reached and set aside by attack from the assignee in bankruptcy, after adjudication; and it seems to me Congress did not intend to leave the creditors of such corporations remediless as to such transactions. The reasoning would seem to be this: The receiver of a state court can convert into money and divide the tangible assets and property of these corporations, perhaps as well as an assignee in bankruptcy, and what the state court shall do in that direction, the bankrupt court shall not undo, but the creditors shall also have all the remedies of the bankrupt law for recovering fraudulent gifts and conveyances, and property or money paid by way of preference.

The objections on the ground of jurisdiction raised by the answer are, therefore, overruled. And it having been conceded on the argument that the acts of bankruptcy alleged in the petition are true and well-pleaded an adjudication will be entered according to the prayer of the petition.

As to the effect of possession of property by a receiver appointed by a State Court, consult Bump's Bankruptcy, 8th ed., 208, 305, and cases there cited.—[Reporter.]

In re Shanahan & West.

*In re SHANAHAN & WEST.*DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—APRIL,
1874.

IN BANKRUPTCY.

1. POSSESSION OF PARTNERSHIP ASSETS.—A solvent partner has no right to the possession of partnership assets in the hands of an assignee under an adjudication against the remaining members of the firm.

2. RIGHTS OF GUARANTOR IN FIRM ASSETS.—A person guarantying the notes of a firm, and contracting for an interest in the firm property after payment of its indebtedness, takes subject to the rights of the creditors, and the crediting up by the firm to each member of his interest, does not affect the rights of the creditors in the fund in the hands of the assignee.

3. JUDICIAL COGNIZANCE OF INSOLVENCY.—If these guarantied notes are unpaid and proved against the estate, the court will take judicial cognizance of that fact as negating the solvency of the guarantor.

Dent & Black, for Wm. J. Manning.

McClellan & Hodges, for Assignee.

BLODGETT, J.—In the matter of Shanahan & West, I am prepared to dispose this morning of the question raised upon the petition of William J. Manning to have the funds in court paid over to him, and the proceeds in the hands of the assignee ordered into his hands, on the ground that he is the solvent partner of the firm. The petition sets up in substance that Edward Shanahan, James West, and the petitioner, were partners under the firm name of Shanahan & West; that some time in February, 1873, some four months after the partnership was formed, and after Manning had become a member of the firm, and invested with all the rights of an equal owner in the property, Shanahan filed a petition to have the firm adjudged bankrupt; that that petition was subse-

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quently amended so that Manning's name was stricken out, and the petition stood as a petition to have Shanahan & West adjudged bankrupts, they having been former co-partners before Manning became a member of the firm; and that such proceedings were had that Shanahan & West were adjudged bankrupts, Manning being dismissed from the case. He now claims that he is solvent, and that, as the surviving solvent member of the firm, he is entitled to have the assets of the firm delivered over to him for the purpose of closing up the affairs of the firm and paying its debts. The answer of the assignee in bankruptcy of Shanahan & West, sets up in substance that Shanahan & West were co-partners in business in this city for a considerable time prior to the first of January, 1873, and that, as such co-partners, they contracted a large amount of indebtedness; that in the latter part of October, 1872, or first of January, 1873, they took Manning into partnership under an article of agreement by which he was to become an equal partner after the payment of the debts of the firm of Shanahan & West; and the answer then avers that the indebtedness of Shanahan & West still remains unpaid; that they have been adjudicated bankrupts by reason of that indebtedness, and that an assignee is now in the possession of their estate for the purpose of paying their indebtedness. He denies that Manning is solvent, and denies that Manning is entitled to the possession of the goods, by reason of anything set up in his petition.

I do not see that the replication raises any material facts. It is but a reiteration of the oft-repeated allegation that Manning is solvent. Assuming the allegation to be true, for the purpose of this case, the articles of co-partnership between himself and Shanahan & West, provide as follows:

"In consideration that William J. Manning do assume and indorse the notes of the said Shanahan & West, at seventy cents on the dollar, in accordance with the settlement recently made by said firm with their creditors, the said Edward Shanahan and James West hereby agree to give said Man-

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ning an equal interest with them in the assets of said Shanahan & West, after paying the indebtedness of said firm."

That is the language and that is the contract by which Manning claims to have acquired the right to have these assets now turned over to him. The very terms of the contract are that he gets no rights except such as shall remain after the payment of these debts. Now the court must take notice that the debts of Shanahan & West remain unpaid. They have been proven in bankruptcy here before the court, in all the forms in which it is necessary for the creditors to represent themselves for the purpose of showing that their debts remain unpaid. It seems to me an assumption on the part of Manning that is totally unwarranted by the contract, that he has any right to these goods, except subject to the debts of Shanahan & West. Shanahan & West have been adjudged bankrupts, and it seems to me there can be no doubt but that Shanahan & West's contract with Manning for an interest in their goods, even if it had not been so limited by the agreement, must be taken subject to the rights of their creditors in those goods. They could not, in other words, have made a conveyance of one-third interest in those goods to Manning, so as to defeat their creditors of their right to have their pay out of these goods. These goods, therefore, having come into the possession of this court through its proper officer, it seems to me that they, or the proceeds of them, must remain in the hands of the court for distribution to the creditors of Shanahan & West. And it will be a question, perhaps, to be considered hereafter, if any creditor of Shanahan, West & Manning prove a debt, or attempt to prove a debt, as to how far he should be allowed to participate in this fund. But I am not prepared to concede the position taken by the counsel for Manning in this case, that he, because he is the solvent partner, is entitled to the possession of these goods.

I do not think that the case is analogous to that of the decease of the other members of the partnership, although some courts have used the expression that it is the financial death

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of the partners. The goods form a trust fund for the payment of co-partnership debts, and the party in possession of them, whether he be the assignee of Shanahan & West, or whether he be a solvent partner, is equally bound to execute that trust, and I do not think that the fact that one of the partners of the firm remains solvent while the others are insolvent, would entitle him to take goods out of the possession of the bankrupt court, if they are in its possession. It might be a reason why the solvent partner should not deliver up goods which he had in his possession at the time that the adjudication was made, because it might be equally his duty to execute the law by applying the proceeds of the goods in his possession to the payment of the debts, but the goods that come into the possession of the court through its proper officer, it seems to me, should remain in the possession of the court for the purpose of executing the trust with which those goods are charged. In this case, however, there is no use in considering that proposition, because Manning took his interest in this stock of goods subject to the debts of this firm, and if the debts absorbed the full amount of the goods, then there was nothing for him to take. He took nothing but the *residuum*. It is still further urged on his part that, on the first of January, they credited up to each of the partners their respective interests in the firm, and that therefore his rights have become vested. Now this is not a question of book-keeping. The mere fact that the firm sits down and credits to its respective members their respective interests in the assets of the firm, does not deprive creditors of their rights to be paid out of the funds as an entirety. They cannot separate it by any of the tricks of book-keeping so as to defeat the rights of creditors, and therefore the assertion in the petition that these goods were credited up on the first of January, one-third respectively to each of these partners, does not prove or tend to prove that Manning acquired any interest as against the creditors of Shanahan & West. The answer in this case shows that the debts of Shanahan & West remained

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unpaid; these debts were due at the time Manning attempted to acquire an interest in this firm; and it seems so clear to me as not to be open to argument, that until these debts are paid, without reference to the contract, Manning can acquire no right by purchase which will defeat those creditors of their right to have the proceeds of goods applied to the payment of their claims, whether they are found in Manning's hands, or in the hands of the other bankrupt co-partners.

The petition will therefore be dismissed.

MARY J. LAWRENCE vs. HENRY W. REMINGTON.

CIRCUIT COURT.—WESTERN DISTRICT OF WISCONSIN.—APRIL,
1874.

1. **PLEADING PENDENCY OF SUIT IN BAR.**—The pendency of a suit in a court of general jurisdiction in another state, in which property sufficient to satisfy the demand had been attached, is a bar to a second suit in this court.

2. The rule in some courts that the pendency of an action in a foreign jurisdiction is not pleadable in abatement, does not apply where the plaintiff has secured his debt by attachment in such action.

This was an action upon a judgment recovered in this state in favor of the above-named plaintiff, to which the defendant has interposed two defenses.

First. That an action is pending for the same cause in the District Court of the State of Iowa, for the County of Muscatine, a court of general jurisdiction, in which the property of the defendant to an amount exceeding in value the sum due upon such judgment and costs, has been attached and held to answer any judgment that may be recovered in said court by the plaintiff against the defendant, and that issue has been joined in said suit, and the same is now in readiness for trial.

Second. The defendant's discharge under the insolvent laws of this state since the recovery of the judgments sued upon, and alleging that he was then and still is a resident of this state, and that the contract upon which the judgment was obtained was made in this state, and that the plaintiff when the contract was made, and at the time of obtaining such judgment, was also a resident of this state.

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Tenneys, Flower & Abercrombie, for plaintiff.

J. H. Carpenter, for defendant.

HOPKINS, J.—These issues were by stipulation of the parties tried by the court, and the evidence fully sustained the allegations in the answer. But it was shown that, before the defendant instituted his proceedings in insolvency, the plaintiff had removed from the state and was not there, and has not since been a resident or citizen, and did not appear nor participate in those proceedings.

To parties not acquainted with the practice under the code of this state, the mode of pleading adopted here must seem quite anomalous. But the code of practice of this state allows parties to set up in their answers as many defenses as they have. This has been construed to allow matters in abatement and bar to be set up in the same answer, as was done here.¹

To avoid confusion, the judge, if the case is tried before a jury, orders a special verdict, and when it is tried by the court, he directs the kind of judgment to be entered, either in abatement or bar, as the case may demand.

In this case I think the action should be abated. The plaintiff having an action pending in the state of Iowa, for the same cause, and property attached there sufficient to pay the judgment, in case one is recovered, she cannot maintain this action in this court. This suit is wholly unnecessary, and a suit which is unnecessary is oppressive and vexatious, and should not be sanctioned or sustained by a court.

I know it is held in some cases that the pendency of an action in a foreign jurisdiction is not pleadable in abatement, and one reason assigned is that a party may not be able to obtain satisfaction of his judgment in such jurisdiction, if he

¹ *Sweet vs. Tuttle*, 4 Kernan, 465; *Gardner vs. Clark*, 21 New York, 399; *Freeman vs. Carpenter*, 17 Wisconsin, 126.

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obtain one, so that in order to furnish all reasonable facilities he is allowed to proceed in the courts of different states.¹

But I do not understand that this doctrine has been carried to the extent to allow a party who has secured his debt by attachment of property sufficient to satisfy his claim in a foreign jurisdiction, to sue in another jurisdiction without abandoning his prior suit.²

In *Earl vs. Raymond*, 4 McLean, 233, it is held that the pendency of a suit in a state court, between the same parties, for the same cause of action, when it does not appear that any property had been attached, was pleadable in abatement in the federal courts. Justice McLean refers in his opinion to cases in 9th and 12th Johnson, above cited, but declines to follow them. In *Smith vs. Atlantic Mutual Fire Insurance Co.*, 2 Foster, N. H., 21, the court sustained the plea of another action pending in the federal court of that state. The judgment of the Iowa court in the suit upon this judgment would be a bar, and pleadable as such to an action in this court upon the same judgment, if the suit were commenced after such judgment. It is now well settled that a judgment of a state court of competent jurisdiction merges the cause of action, so that a suit in the federal courts cannot be sustained upon the same cause of action.³

According to that doctrine, I do not discover any reason in holding that the pendency of such suit should not be pleadable in abatement. If the judgment, when recovered, would be a bar, the pendency of the suit to recover it should operate as a suspension of the right to sue upon the same cause of action during such pendency.

I think, therefore, this action should be abated and the writ

¹ *Walsh vs. Durken*, 12 Johnson, 99; *Bowne vs. Joy*, 9 id., 221.

² *Embres vs. Hanna*, 5 Johnson Reports, 101; *Wheeler vs. Raymond*, 8 Cowen Reports, n. a, 811; *Imlay vs. Ellefsen*, 2 East, 157.

³ *Mason vs. Eldred*, 6 Wallace, 321; *Eldred vs. Bank*, 17 Wallace, 545.

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be quashed, and order judgment accordingly, without considering at all the second ground of defense.

To a plea of another action pending, it is a good replication that since the filing of the plea the suit had been dismissed. *Chamberlain vs. Eckert* Vol. 2 of this Series, 124.—[*Reporter*.

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In re C. B. AYERS.

DISTRICT COURT.—WESTERN DISTRICT OF WISCONSIN.—APRIL,
1874.

IN BANKRUPTCY.

1. GUARANTOR—WHEN CANNOT PROVE DEBT.—The guarantors of a note, the holder of which had forfeited his claim against a bankrupt estate, have no right to prove against the estate, their liability having already been discharged by the act of the principal.

2. PARTICIPE CRIMINIS.—If the guarantors participated in the act by which their principal forfeited his claim, they occupy no better position, and cannot prove.

3. PREFERENCE—RELEASING GUARANTOR.—Where the holder has taken a preference, in fraud of the Bankrupt Act, and a recovery has been had against him by the assignee, payment of the judgment does not revive his right to prove against the estate; and by such preference he has released the guarantors, and they have no claim against the estate.

4. REVIVING LIABILITY.—*It seems*, that a guarantor, not legally liable to the holder, cannot, by any subsequent promise, revive the liability of the estate.

Motion by the assignee to expunge the proof of debt filed by A. Prutsman and Charles H. Stowers as guarantors upon two notes of the bankrupt payable to one G. H. Gile, amounting to \$2,049.

The bankrupt and one Fallis being indebted to Prutsman & Stowers, and they owing Gile, the bankrupt, with Fallis, made notes payable to Gile for the amount of the debt due to Prutsman & Stowers, and who then guaranteed them and delivered them to Gile.

Mariner, Smith & Ordway, for the motion.

These creditors had a security and they should release it be-

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fore they can legally prove for the whole. *In re Jaycox & Green*, 8 Bankruptcy Register, 241.

Their not holding the legal title to the security makes no difference. *Id.* 265. A surety or guarantor cannot prove a debt when the principal creditor cannot. *Sigsby vs. Willis*, 3 Bankruptcy Register, 51; *In re Ellerhorst*, 5 do., 144. Gile could not prove without a surrender, and payment of the judgment was not a surrender. *In re Tonkin & Trewartha*, 4 Bankruptcy Register, 13; *In re Richter*, id., 67; *In re E. R. Stephens*, 3 Bissell, 187.

Judgment against Gile for fraud is *res adjudicata* as against these creditors, they being in privity with him. *In re Richter*, 4 do., 67; S. C., 3 Chicago Legal News, 33.

George W. Burnell, contra.

By rule 34 (1871), of the U. S. Supreme Court contingent liabilities must be proved in the name of the creditors if known. Creditors ignorant of a fraudulent conveyance to another party, but who afterwards express themselves as satisfied with it, may prove their claims. *In re Chamberlain*, 3 Bankruptcy Register, 176.

The case of *Sigsby & Willis*, cited by the opposite counsel, was between partners, and is not in point.

HOPKINS, J.—From the evidence read on the hearing of the motion, it appears that within four months before the filing of the petition in bankruptcy, the bankrupt made a bill of sale of his lumber to Mr. Gile, to pay or secure the payment of these notes, and that the assignee brought suit in the United States Circuit Court for this district, against said Gile, for the recovery of the value of such property, on the ground that the sale was illegal and void as constituting a preference contrary to the provisions of the bankrupt act, and that he recovered a judgment therefor, which Gile afterwards paid.

This motion is made on the ground that, as Gile, the holder of the notes, could not prove the claim on account of

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his fraud in attempting to obtain a preference, the guarantors of the notes cannot do so.

I think it is clear that Mr. Gile, by his effort to obtain and hold a fraudulent preference, forfeited his right to prove the debt or to participate in the bankrupt's estate.¹

The subsequent payment of the judgment was not a surrender within the meaning of section 23, so as to remove the disability and revive the right to prove his debt.²

If guarantors and indorsers may prove the debt or claim in such cases, notwithstanding the fraud of the holder, this provision of the law may be wholly avoided and rendered nugatory.

But the Supreme Court of the United States, in the case of *Bartholow vs. Bean*,³ recently decided, have laid down a proposition which I think must control this case. Justice Miller, who delivered the opinion, says: "It is very obvious that the statute intended, in pursuit of its policy of equal distribution, to exclude both the holder of the note and the surety or indorser from the right to receive payment from the insolvent bankrupt. It is forbidden. It is called a fraud upon the statute in one place and an evasion in another." After stating that a holder of indorsed paper might refuse a tender of payment, and that such refusal would not exonerate the surety or indorser, because in refusing he would be but obeying the plain mandate of the bankrupt act, he says, "by receiving the money, the holder of the note makes himself liable to a judgment for the amount in favor of the bankrupt's assignee, and loses his right to recover either of the indorser or of the bankrupt's estate." The italics are mine, made because of the great importance of the principle included and enunciated in that clause.

¹ Sec. 39 of Bankrupt Act; *In re Stephens*, 3 Bissell, 187; *Cookinham et al. vs. Morgan et al.*, 5 Bankruptcy Register, 18.

² *Hood et al. vs. Karper et al.*, 5 Bankruptcy Register, 358.

³ 18 Wallace, 635.

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That case, as I have before said, would seem to dispose of the question involved in this motion; for, if the holder of a note forfeits his claim as against the sureties by his fraud upon the bankrupt act, then these guarantors are not or would not be legally liable to Mr. Gile, and do not occupy the position of parties who are authorized, under section 19, to prove their debts, as they are not "liable as bail, surety, guarantors or otherwise for the bankrupt;" so that, giving to the language of the opinion above italicized its natural and obvious meaning, this motion must be granted, for the facts of this case clearly bring it within the doctrine there announced.

In this case Mr. Stowers, who makes the affidavit or proof, says they are liable. Whether that statement was made under a misapprehension of the law, or they have voluntarily promised to pay the notes since, does not appear, and it is probably immaterial, for if they were not legally liable to the holder, after his fraudulent act, they cannot by any subsequent promise revive the liability of the estate to them.

But it will be seen that section 19 authorizes parties liable for the debts of a bankrupt, who have not paid the same or any part thereof, to prove such debts only when the "creditor shall fail or omit to prove them."

It would be an unwarrantable construction to give to those words, it seems to me, to hold that they covered the case of a creditor who had forfeited his right to prove his debt by his own fraudulent acts.

The doctrine enunciated in the opinion of the Supreme Court is not by any means new. It is only a new application of the old rule that every act of a creditor which extinguishes his remedy as against the principal absolves the surety, guarantor or indorser.

But even if there is any question upon this view of the case, I think, upon another ground, this motion must be granted. The testimony taken and read on this motion shows that the guarantors themselves participated and assisted in obtaining the illegal preference of this claim, were *participes*

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criminis, and therefore occupy no better or different position than the holder, and cannot be permitted to prove the claim any more than he could. They were the parties "to be benefited," within the meaning of sections 35 and 39 of the Bankrupt Act, and being actors in the illegal transaction, they must be excluded from all participation in the bankrupt's estate.

The proof of the claim is therefore stricken out and expunged, and the register will strike these claimants from the list of creditors of the estate.

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DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—APRIL,
1874.

IN BANKRUPTCY.

WAGER CONTRACT—PUBLIC POLICY.

1. "PUTS," or the privilege for a nominal consideration of delivering a large quantity of grain within a certain time at a specified price, when taken of parties notoriously running a "corner," are wager contracts, and void as against public policy.

2. **SETTLING DIFFERENCES.**—Where no delivery of the grain was contemplated by the parties, but they expected simply to settle the differences as established by future prices, the contract is simply a wager, and therefore void.

3. **VOID UNDER GAMING STATUTE.**—These "puts" are also within the Illinois statute concerning gaming, and the English decisions under 8 and 9 Victoria, are applicable as authorities.

4. **INADEQUACY OF CONSIDERATION.**—Claims against an estate for \$400,000, founded on a consideration of less than \$19,000, are grossly inequitable and unjust, and should not be allowed.

5. The "put" cannot be sustained, as being a measure of insuring prices, when such is not shown to have been the intent of the parties.

6. Money actually paid on these "puts" may be proved as claims against the estate.

These questions come up on motion by Sidney A. Kent, the assignee of Peyton R. Chandler, and Chandler, Pomeroy & Co., to expunge the claims of Wm. Young & Co., Bensley & Wagner, and a large number of others of the same character, on what are called "puts." These claims, having been first allowed *pro forma* by the register, were referred to him by the court for re-examination under the 84th General

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Order, and the evidence was by him reported to the court. The facts fully appear in the opinion of the court.

Dent & Black, for Wm. Young & Co., claimants.

1. It was not necessary that Wm. Young & Co. should have any of the property on hand when they entered into or took these contracts. *Benjamin on Sales*, 2d London Ed.. 66; Chitty on Contracts, 10 American Ed., 442; *Hibblewhite vs. M'Morine*, 5 Meeson & Welsby, 462; *Wells vs. Porter*, 2 Bingham, New Cases, 722; *Porter vs. Viets*, 1 Bissell, 177.

2. Nor does the fact that it was optional with Wm. Young & Co. to deliver, render the contracts less binding. 2 Parsons on Contracts, 5th ed., 657. The doctrine there laid down, being that "an agreement may be altogether optional with one party, and yet binding on the other."

3. As a mere offer from Chandler to Wm. Young & Co., these contracts gave a right to the latter to deliver; and this offer not being withdrawn, it continued up to and at the time of the tender. *Boston & Maine R. R. vs. Bartlett*, 5 Cushing, 224; *Western Railroad Co. vs. Babcock*, 6 Metcalf, 346; 1 Parsons on Contracts, 5th Ed., pp. 436, 480-2. Consult also, *Harlan vs. Harlan*, 20 Pennsylvania State R., 303, 307.

4. This view also disposes of the objection alleging a want of mutuality. A contract, according to the opinion of Tindal, C. J., in *Arnold vs. The Mayor of Poole*, 4 Manning & Granger, 896, cannot be said to be void on that ground, except "where the want of mutuality would leave one party without a valid or available consideration for his promise." *L'Amoureux vs. Gould*, 7 New York, 3 Selden, 349; Chitty on Contracts, 10th American Edition, 13; *Morse vs. Bellows*, 7 New Hampshire, 549. The law on the subject of wagers, so far as any question arises in regard to it here, is fully laid down in *Fleming vs. Foy*, 4 Cranch, C. C., 423; *Beadles vs. Bless*, 27 Illinois, 320; *Bryan vs. Dyer*, 28 Illinois, 188. Consult also *Wells vs. Porter*, 2 Bingham, New Cases, 722, 29 English Common Law, 733; *Alsop vs. The Commercial Insurance Co.*, 1 Sumner, 451.

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5. A court should not be quick to set aside a contract on account of any supposed public policy, as clearly the legislature is the forum before which such matters most appropriately come in the first instance. The observations of Best, C. J., in *Richardson vs. Mellish*, 2 Bingham, 563, are pertinent to the point in hand.

6. And again, the inquiry as to what was a violation of public policy, and who was the violator, must be made.

7. But, even if it had to be conceded that the claimants knew that Mr. Chandler's action was wild, so far as his general operations in the oat market were concerned, and would cause irregularities of trade, still the law would not refuse its aid to those who did not instigate or participate in such action. In *Tracy vs. Talmage*, 14 New York, 162, a case of great importance, and maturely considered, the Court of Appeals held that, "Mere knowledge by the vendor that the purchaser intends to make an illegal use of the property, is not a defense to an action for its price." Consult also *Hill vs. Spear*, 50 New Hampshire, 253; *Mitchael vs. Bacon*, 49 Missouri, 474.

Goudy & Chandler, and *James E. Monroe*, for Bensley & Wagner, claimants.

The contract is valid on its face, and it is not unilateral, nor void for want of mutuality. In the following cases contracts challenged for want of mutuality have been enforced: *In the matter of Jane Hunter*, 1 Edward's Chancery Reports, 1, and Bingham on Sale of Real Property, 460; *Eno vs. Woodworth*, 4 New York, 249; *Page vs. Hughes*, 2 Ben Monroe, 439; *Mason vs. Payne*, 47 Missouri, 517; Fry on Specific Performance, 291; *Towers vs. Barrett*, 1 Term Reports, 133; Story on Sales, §§ 247, 248, 417; Metcalf on Contracts, 21; *Newberry vs. Armstrong*, 4 Carrington & Payne, 59; *Paige vs. Parker*, 8 Gray, 213; *Morton vs. Burn*, 7 Adolphus & Ellis, 23; *Kennaway vs. Trellavan*, 5 Meeson and Welsby, 498; *Giles vs. Bradley*, 2 Johnson's Cases, 252; *Dis-*

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borough vs. Neilson, 3 do., 81; *Cherry vs. Smith*, 3 Humphry, 19.

There is no statute prohibiting such a contract, nor is it void by any rule of the common law.

That it should not be considered under any claim or consideration of public policy, consult *License Tax Cases*, 5 Wallace, 462, 469; *Brown vs. Speyers*, 20 Grattan, 296; 1 Story on Contracts, §§ 546-7, 566; *Good vs. Elliott*, 3 Term Reports, 698; *Porter vs. Viets*, 1 Bissell, 177; *Tyler vs. Barrows*, 6 Robertson (N. Y.), 104; *Hibblewhite vs. M'Morine*, 5 Meeson & Welsby, 462, overruling, *Bryan vs. Lewis*, Ryan & Moody, 386.

A wager is not illegal at common law. *Morgan vs. Petrer*, 4 Scott, 230; *Good vs. Elliott*, 3 Term Reports, 693; *Wells vs. Porter*, 2 Bingham, 722, 732; *Mortimer vs. M'Callan*, 6 Meeson & Welsby, 38; *Morgan vs. Richards*, 1 Brown, Pa., 171; *Campbell vs. Richardson*, 10 Johnson, 406; *Morgan vs. Pettit*, 3 Scammon, 529; *Smith vs. Smith*, 21 Illinois, 244; *Beadles vs. Bless*, 27 do., 320.

Harding, McCoy & Pratt, for assignee.

These "puts" should not be enforced, as inequitable and unconscionable. *James vs. Morgan*, 1 Levinz, 111; *Thornborrow vs. Whitaker*, 2 Lord Raymond, 1164; *Gwynne vs. Heaton*, 1 Brown's Chancery, 9; *Howard vs. Edgell et al.*, 17 Vermont, 27; *Savile vs. Savile*, 1 Peere Williams, 745; Fry on Specific Performance, §§ 177, 277, 279 and notes; *Osgood vs. Franklin*, 2 Johnson's Chancery Reports, 24; *Johnson vs. Dorsey*, 7 Maryland, 294; *Cockell vs. Taylor*, 15 Beavan, 115; *Seymour vs. DeLancey*, 3 Cowen, 445; *Hamilton vs. Grant*, 3 Dow, 33-47; *Kimberly vs. Jennings*, 6 Simons, 340.

This contract is void for want of mutuality. *Baxter vs. Lamont*, 60 Illinois, 237.

The letter of the contract does not necessarily prevail, but it may be shown by parol to be void. *Paxton vs. Popham*, 9 East, 408; *Chandler vs. Ford*, 3 Adolphus & Ellis, 651;

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Mitchel vs. Reynolds, 1 Peere Williams, 196; *Grizewood vs. Blane*, 11 Common Bench Reports, 538; *Brua's Appeal*, 55 Pennsylvania State Reports, 294; *Kirkpatrick et al. vs. Bon-sall*, 72 Pennsylvania State Reports, 155; *Tyler vs. Barrows*, 6 Robertson, 104; *Cassard vs. Hinman*, 1 Bosworth, 207.

The contract is void on the ground of public policy. *Mount et al. vs. Waite*, 7 Johnson, 434; *Edgell vs. McLaughlin*, 6 Wharton, 175; *Ball vs. Gilbert*, 12 Metcalf, 397; *Marshall vs. The Baltimore & Ohio R. R. Co.*, 16 Howard, 333-6; *Stanton vs. Allen*, 5 Denio, 434; *Neustadt vs. Hall*, 58 Illinois, 175.

These "puts" are also void as contrary to public policy and public interest. *Morgan vs. Pettit*, 3 Scammon, 529; *Bea-dles vs. Bliss*, 27 Illinois, 320; *Gregory vs. King*, 58 Illinois, 169; *Edgell vs. M'Laughlin*, 6 Wharton, 175; *Ball vs. Gilbert*, 12 Metcalf, 399; *Egerton vs. Earl Brownlow*, 4 House of Lords Cases, 143; *Stanton vs. Allen*, 5 Denio, 441; *Neustadt vs. Hall*, 58 Illinois, 175.

This contract was really an agreement to "settle the differences," a bet upon the price; and such contracts are void. *Rourke vs. Short*, 5 Ellis & Blackburn, 904; *Shumate vs. The Commonwealth*, 15 Grattan, 653.

Where advantage is taken of the ignorance or distress, or necessity of another, it affords a new and distinct ground for setting aside a contract, and either of these circumstances existing, in connection with gross inadequacy is enough to warrant a court in so doing; *Osgood vs. Franklin*, 2 Johnson's, Chancery Reports, 24; *Johnson vs. Dorsey*, 7 Gill's Maryland, 269-294; *Cockell vs. Taylor*, 15 Beavan, 115; *Seymour vs. DeLancey*, 3 Cowen, 445; Fry on Specific Performance, §277, note 1, and cases cited; *Hamilton vs. Grant*, 3 Dow, 33-47; *Kimberley vs. Jennings*, 6 Simons' Chancery Reports, 341.

The contract is void for want of mutuality. Pothier,

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Part 1, Chap. 1, Art. 3, Sec. 7; Fry on Specific Performance, § 286, note, and cases cited; *Baxter vs. Lamont*, 60 Illinois, 237.

This is a wagering contract, contrary to public policy and public interest, and therefore cannot be enforced; *Sampson vs. Shaw*, 101 Massachusetts, 145; *Hilton vs. Eckersley*, 6 Ellis & Blackburn, 47; *Paxton vs. Popham*, 9 East, 201; *Collins vs. Blantern*, 2 Wilson, 347; *Chandler & Ford*, 3 Adolphus & Ellis, 649; *Mitchel vs. Reynolds*, 1 Peere Williams, 196; *Grizewood vs. Blane*, 11 Common Bench, 538; *Brua's Appeal*, 55 Pennsylvania State, 298; *Kirkpatrick et al. vs. Bon-sall*, 72 Pennsylvania State Reports, 155; *Ex parte Murnham*, 2 DeGex, Fisher & Jones, 634; *Tyler vs. Barrows*, 6 Robertson, 104; *Cassard vs. Hinman*, 1 Bosworth, 207. The case of *Porter vs. Veite*, 1 Bissell, 177, relates to a contract, not to a "put."

These "puts" are void, as being within the 1st Sec. of the statute of this state concerning gaming (1 Gross, 312).

"All promises, agreements, etc., made, etc., where the whole or any part of the consideration thereof, shall be for any money, property, or other valuable thing, won by any gaming, or playing at cards, etc., or by betting on the side or hands of any person gaming, etc., shall be void."

The spirit in which the Supreme Court of Illinois regards this species of contract appears in 59 Illinois Reports, 160.

Another view may be taken of the case—the "put" is simply an agreement to "pay differences"—a bet upon the price. Consult *Rourke vs. Short*, 5 Ellis & Blackburn, 904; *Shumate vs. The Commonwealth*, 15 Grattan, 653.

Walker, Dexter & Smith, also for assignee.

BLODGETT, J.—It appears from the testimony submitted with the Register's report that in the month of May, 1872, and for several years prior thereto, the bankrupts, Peyton R. Chandler, and the firm of Chandler, Pomeroy & Co., were

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engaged in the business of buying and selling grain on the Chicago market, and as members of the Board of Trade of this city; that Chandler, Pomeroy & Co. were brokers and commission merchants, and Peyton R. Chandler dealt mainly on his own account as a capitalist, through Chandler, Pomeroy & Co., who acted as his brokers; that about the middle of May, Peyton R. Chandler conceived the idea of making a corner in oats for the month of June then ensuing, and with that view he purchased all the "cash oats" as they arrived in the market, and took all the "options" offered him for June delivery,—his purpose being to own all the oats in the market, and compel those who had sold "options" for June to pay his price; or, in other words, to settle with him by paying such differences as should exist between the prices at which he purchased the options, and the price he should establish for cash oats on the last day of June, when his options matured. In pursuance of this plan, he purchased, between the 15th of May and the 18th of June, 2,500,000 bushels of cash oats, being all, or substantially all, the cash oats on the market, and also bought June "options" to the amount of 2,939,400 bushels. The total amount of oats in store in this city on the 18th of June was only 2,700,000 bushels, from which it will be seen that Chandler practically controlled the market up to that time, and the total amount received during the remainder of the month was only 800,000 bushels. As incidental to and part of the machinery of this corner, Chandler also sold what are called "puts," or privileges of delivering to him oats during the month of June, for forty-one cents a bushel. These "put" contracts are alike in form, and read as follows:

"Received of E. F. \$50, in consideration of which we give him, or the holder of this contract, the privilege of delivering to us or not, prior to 3 o'clock, p. m., of June 30, 1872, by notification or delivery, 10,000 bushels No. 2 oats, regular re-

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ceipts, at 41 cents per bushel, in store; and, if delivered, we agree to receive and pay for the same at the above price.

CHANDLER, POMEROY & Co.
P. R. CHANDLER."

CHICAGO, June —, 1872.

The amount paid by the purchaser of these "puts" was $\frac{1}{2}$ cent per bushel for whatever quantity was named in the contracts. The tickets, or contracts, were all signed by Chandler, Pomeroy & Co., and part of them were also signed by P. R. Chandler, but Chandler, Pomeroy & Co. acted as the brokers of P. R. Chandler, and their contract was his. The total quantity of oats called for by these "puts" amounted to about 3,700,000 bushels.

When Chandler commenced to buy oats with a view to the corner, the price in this market was about thirty-nine cents a bushel. After he took possession of the market he put the price to forty-one cents and upward, and held it there until the 18th of June. In the meantime the price had declined in New York and other markets, so that oats to ship were not worth over thirty-three to thirty-five cents, and July options for this market were not worth over thirty-five cents. On the 18th of June P. R. Chandler and Chandler, Pomeroy & Co. failed, and the price declined before the close of business that day from forty-one to thirty cents, and continued to decline during the remainder of the month, so that at one time they were as low as twenty-six cents per bushel. Between the time of the failure and 3 o'clock on the 30th of June, the holders of the "puts" claim to have made tender to the bankrupts of the quantity of oats called for by their respective tickets, and the oats not being accepted and paid for, they sold them upon the market that day or the next, under the rules of the Board of Trade, and have proved up their claims for the differences between the price named in the "put" and that for which they sold.

The total amount of claims thus proved up is about \$400,-

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000, and the total amount received by the bankrupts for these "puts" was less than \$19,000,—about \$18,500, as I compute it at half a cent a bushel.

The proof shows conclusively that the plans of Chandler, and the fact that he was manipulating the market with express reference to a corner in oats for June, were well known and understood on the Board of Trade, while the number of these "put" claims, about 125, all, or substantially all, in favor of members of the Board, show that the struggle between Chandler, who was endeavoring to hold up prices, and the sellers of "options" and holders of "puts" who were endeavoring to break the price, was quite generally participated in by members of the Board. In other words, it was notorious that Chandler was endeavoring to keep the price at forty-one cents or upwards, while the sellers of "options" and holders of "puts" were endeavoring to break down the price. It is true that in this testimony some of the claimants say there was no "corner," or that they did not know that there was a corner, but the cross-examination shows that they knew Chandler was trying to make a corner, and they say he did not do it because he failed before the end of the month, so that by their own admission, they knew what he was attempting—knew the reasons for his purchase of such large quantities of "cash oats," and options, and knew he did not sustain his corner because the "short interest broke him down," and the moment a man bought a "put," he became identified with the short interest—his interests were antagonistic to Chandler.

The assignee attacks these claims upon the ground that they are fraudulent as against the other creditors of the bankrupt. The main ground, and the only one which I shall consider, being that they are wager-contracts, and therefore void. Without taking time to discuss all the points raised by the able arguments which have been adduced, and the various reasons urged for and against these claims, it is enough to say that it seems to me that the contracts in question partake of all the characteristics of a wager. It is in substance

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an assertion by the seller of the "put" that oats cannot be purchased on that market before three o'clock, p. m. of the 30th of June for less than forty-one cents a bushel, and an undertaking to pay the difference between forty-one cents and any market price. If he, Chandler, sustains the price at forty-one cents or above, he wins the half-cent a bushel paid for the "put," because the holder will not deliver, while if the price goes below that named he is to pay the difference. This is practically the contract.

It is as manifestly a bet upon the future price of the grain in question, as any which could be made upon the speed of a horse or the turn of a card. The evidence in this case shows that in nearly all the cases of settlements on "put" or "option" contracts the grain is never delivered, nor expected to be delivered, but the parties simply pay the difference as settled by the prices. But, if that were not so in all cases, it is clear that in this case no delivery of the grain was intended by these "put" holders, because they knew that Chandler controlled all the oats in the market and fixed the price, and that their only expectation for success depended on their being able to break the market before their time for delivery expired. Some of them say that they intended to deliver the oats, but it is absurd to suppose that they intended to deliver, unless they could do so for less than forty-one cents. They intended to deliver if they could break Chandler, or prevent his "corner" from culminating, as the jockey may intend to walk his own horse over the course after he has poisoned or lamed that of his competitor. They did not intend to deliver if Chandler succeeded. Thus a struggle inevitably ensued between Chandler and the holders of this immense amount of "puts" and "options," Chandler alone on one side attempting to hold up the price, and all the rest seeking to put it down. The fact that the sellers of "options" and holders of "puts" were able to get resolutions through the Board of Trade, making new warehouses, where oats had never been stored before, "regular" for the performance of these contracts, shows the inten-

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sity of the contest and the overwhelming influences with which Chandler had to contend. I do not mean to be understood as saying that the fact that Chandler sold "puts" to so many as to create an overwhelming opposition, makes the transaction any more or less a wager than if he had only sold one "put," but it shows the notoriety of the whole proceedings.

From the very nature of the transaction the interest of the holder of the "put," is to break down the price, and that of the seller to maintain it. The number engaged in this transaction, and the quantities involved, demonstrate that neither party expected any grain to be delivered. Chandler expected to hold up the price, in which event no grain would be offered him, and the other parties must have known they could not get the grain to deliver unless they first broke Chandler, as he held all the grain, and then, although they might tender, he could not receive, so that in reality no actual delivery was anticipated. They made their tenders only as a method of establishing differences after he had failed, and was powerless.

That transactions of this kind are only wagers, is abundantly established by authorities.¹

It is true those cases arose under statutes making such transactions void as gaming contracts. But the test applied was: Did the parties intend to sell on one side and buy on the other the stocks which purported to be the subject-matter of the transaction, or did they only intend to adjust the differences? And as it was found that they only meant differences when they said shares, the contracts were held to be essentially gambling contracts, and therefore void.

It is said, however, that there is no statute in this state expressly prohibiting contracts of this kind, as there is in England and Pennsylvania; and, as the Supreme Court of this

¹ *Grisevood vs. Blain*, 11 Common Bench, 589; *Brua's Appeal*, 55 Pennsylvania State, 298; *Kirkpatrick vs. Bonsall*, 72 Pennsylvania State, 155; *Ex parte Mornham*, 2 DeGex, Fisher & Jones, 634; *Cassard vs. Hinman*, 1 Bosworth, 207.

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state has decided that wagers are not necessarily void, therefore, these contracts—not being inhibited by any express law of this state—are not void. There is no dispute that contracts of wager are valid at common law, unless affected with some special cause of invalidity.¹

But wagers which are contrary to public policy have always been held by the courts to be essentially void, without statutory prohibition, and cannot be made the ground of an action.²

And a high authority in the profession has stated the law on the subject of the validity of wagers with great force and clearness, when he says:

“As the moral sense of the present day regards all gaming or wagering contracts as inconsistent with the interests of the community, and at variance with the laws of morality, the exception necessarily becomes the rule.”³

Indeed, any one rising from a full examination of the law applicable to wagers, as expounded by the courts, would undoubtedly testify that, while he has found in the books, and especially among the older text-writers and cases, general expressions to the effect that wagers were valid at common-law, he has found the cases where they have been enforced to be extremely rare, and the courts have been astute to find reasons for not enforcing them.

Following this general current of authority, the Supreme Court of this state, under the statute prohibiting gaming, has decided that the wagers upon horse-races are void, and cannot be enforced; and that money paid on such wagers can be recovered back.⁴

The language of the Illinois statute on which these decisions

¹ *Ball vs. Gilbert*, 12 Metcalf, 397.

² *Hartley vs. Rice*, 10 East, 22.

³ 2 Smith's Leading Cases, 306.

⁴ *Tatman vs. Strader*, 28 Illinois, 493; *Garrison, et al. vs. McGregor*, 51 Illinois, 473.

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are based, is, in substance, that all promises made, etc., where the consideration, or any part thereof, shall be money won by gaming, etc, shall be void.

The language of 8 and 9 Victoria, on which the *Grizewood vs. Blain* and other English cases were decided, is: "All contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void." The precise question made in this case has never been before the Supreme Court of this state to my knowledge, and I am not aware that it has ever been raised at the Circuit, except in a late case before His Honor Judge Tree, of this city, when he held that "option contracts for grain, when the parties intended only to pay the differences, and not to deliver the grain, were void, as wagering contracts." But it hardly seems possible that any court called upon to construe the Illinois statute in the light of the expositions already made by our courts, and of the English decisions upon a statute so substantially similar, could hesitate to pronounce these contracts wagers, and void as contrary to the statute.

But even if not within the letter or spirit of the statute of this state, the common law authorities quoted show that all wagers contrary to the public policy are void without reference to any statute. And, as the contracts under consideration are essentially nothing but bets upon the price of oats in this market within the time limited, and as it is obvious that the effect of such transactions is to beget wild speculations, to derange prices, to make prices artificially high or low, as the interests, strength and skill of the manipulators shall dictate, thereby tending to destroy healthy business and unsettle legitimate commerce, there can be no doubt of the injurious tendency of such contracts, and that they should be held void as against public policy. As is most cogently said by the learned judge who delivered the opinion in the case cited from 55 Pennsylvania State Reports:

"Anything which induces men to risk their money or property without any other hope of return than to get for nothing

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any given amount from another, is gambling, and demoralizes the community, no matter by what name it may be called."

The financial disaster and ruin which followed "Black Friday" in New York, and the scarcely less damaging local consequences which followed the various "corners" which have either succeeded or been attempted in this city, furnish conclusive proof, if proof were needed, that such gambling operations should be held void, as contrary to public policy.

The total amount paid by the claimants in these cases was less than \$19,000, and yet the amount they claim is within a fraction of \$400,000—a disparity between the consideration paid and the sum demanded which strikes the mind at once as so grossly inequitable that the judicial conscience is shocked, and revolts from being made the instrument for enforcing such outrageous injustice.

I do not intend to be understood as holding that every option contract for the delivery of grain or stock, or that every "put," is necessarily void, but only that all these contracts, in the light of the testimony before the court, were in their essential features gambling contracts. The parties when they made them did not intend to deliver the grain, but only at the utmost to settle the differences. They knew they could not obtain the grain to deliver if Chandler sustained his "corner," and their action in buying a "put" was virtually a bet on their part that he could not accomplish what they all knew he was endeavoring to do, that is, keep up the price through June to his own figures, and virtually a bet on his part that he could do so.

It is shown in the proof, and urged in the argument, that the "put" is in itself a very harmless contract—that dealers frequently resort to it as a method of insuring prices. It is answer enough to this to say that the proof fails to show that such was the object of any of these claimants. Chandler was taking all the cash oats offered at the price named in the "puts" and upward, and none, with the exception of Bensley, claim that they had any oats to fill the "puts" at the

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time they bought, or bought for that purpose till after Chandler's failure. It is perhaps possible to imagine a dealer with a stock of grain on hand which he wishes to hold for an advance, who may take a privilege of this kind to insure himself against a decline while waiting for an advance. But the very act of offering to sell a "put" either implies that the seller has control of the market so that he expects to make his own price, or else it is a mere reckless assertion of the seller's opinion that the price will be maintained, either of which partakes of the character of a bet.

"A wager," says Bouvier, "is a contract by which two parties or more agree, that a certain sum of money or other thing, shall be paid or delivered to one of them on the happening or not happening of an uncertain event."

To say that these contracts were taken for the purposes of insurance, is too far-fetched an excuse, and evidently an after-thought.

In what I have said I do not intend to vindicate Chandler. His conduct was as reprehensible as that of the claimants. All were engaged in an immoral and illegal transaction, and this court ought not to allow its powers to be prostituted to the enforcement of these contracts for either party. Money lost at play or in gaming cannot be recovered except where an action is given by statute, but, as I have already intimated, my opinion that these cases are within the statute of this state on the subject of gaming, under which money paid may be recovered back, I shall allow the claimants to prove their claims for the amounts actually paid by them respectively, which is a half cent per bushel on the grain named on their tickets.

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In re DAVID W. JONES.

DISTRICT COURT.—WESTERN DISTRICT OF WISCONSIN.—APRIL,
1874.

IN BANKRUPTCY.

HUSBAND AND WIFE—WIFE'S PROPERTY.

1. **HUSBAND NOT COMPETENT WITNESS.**—In Wisconsin the husband is not competent as a witness for his wife; this incompetency rests on grounds of public policy, and is not removed by the statute removing the disqualification of interest.

2. **Securities taken in wife's name** will not pass to her as her separate property, if they were so drawn simply for convenience; it must clearly appear that they were intended as a settlement upon her.

3. **USED BY HUSBAND.**—Where such securities are used and collected by the husband with the wife's consent, this conduct disproves the claim that they were intended as a settlement upon her.

4. **ESTOPPEL.**—The wife having allowed him to enjoy the credit of such securities and their proceeds, cannot afterwards claim them as against creditors who have trusted him on the faith of such apparent ownership.

5. **If she joins him when embarrassed in conveying his property to their children, making no claims for herself, she cannot afterwards set up a claim when such conveyances are about to be set aside.**

6. **CREDIBILITY OF WIFE'S TESTIMONY.**—Where this is defective and contradictory, particularly about the most material matters, her statements as to the amount of her claim should be looked upon with suspicion.

7. **TITLE OF PROPERTY DEVISED FOR DISTRIBUTION.**—Where property is willed to executors to convert into a fund, and keep and distribute, etc., the title remains in them until it is actually distributed; and where a discretion is to be exercised before a distribution, the ultimate distributee has no vested interest in the property until such discretion has been exercised.

8. **OPERATION OF PROPERTY ACT ON VESTED RIGHTS.**—A note given to her for money loaned by her while unmarried, and prior to the passage of the Married Woman's Property Act, passes to the husband under the common law rule, and his vested interest therein cannot be abrogated by any subse-

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quent act of the Legislature; and though he receives the money thereon, she cannot prove the amount against him as a debt in bankruptcy.

9. RECEIPT OF INCOME OF WIFE'S ESTATE.—A married woman may bestow upon her husband the income of her separate estate; and where the husband, with the consent of the wife, is in the habit of receiving such income and profits, this shows her voluntary choice to thus dispose of them for the use and benefit of the family, and the husband will not be required to account therefor, beyond the amount received during the last year.

10. A claim founded upon such receipt of income and profits will not be allowed against the husband's estate.

11. ACCOUNT.—The fact that no account was kept by either party as to the money thus received strengthens the presumption of law that there is no agreement to repay it.

Motion by the assignee of David W. Jones to expunge the proof of debt filed by Emily Jones, his wife, and proven up at the amount of \$39,412.63.

The facts are fully stated in the opinion.

Gregory & Pinney, for assignee.

Vilas & Bryant, for Mrs. Jones.

HOPKINS, J.—At the hearing, the creditor, Mrs. Jones, offered her husband, David W. Jones, as a witness in her favor. He was objected to by the counsel for the assignee as incompetent, and the court sustained the objection, following the construction given by the Supreme Court of this state to the statute relating to evidence.¹

The court there hold that the exclusion of husband and wife as witnesses for each other in civil suits, is not based solely on interest, but rests upon principles of public policy, and as the statute only removes the ground of interest, the ground of public policy still renders them incompetent.²

I thought it best to notice my ruling on that question with

¹ *Farrell vs. Ledwell*, 31 Wisconsin, 182.

² *White vs. Stafford*, 38 Barbour, 419; *Hasbrouck vs. Vandervoort*, 5 Selden. 153.

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a reference to the authority upon which I relied before going into the merits of the case.

The proof filed states that the bankrupt collected and received money belonging to her as her separate estate, at various times, from the 25th of March, 1865, to the 10th of July, 1871, amounting in the aggregate to \$31,662.82, which, with the interest up to the adjudication of bankruptcy, amounted to the sum of \$39,412.63; and further states that no part had been paid except \$1,267.22, which he paid to her in notes of other parties.

It is further stated in the proof that he purchased certain real estate with the money, in this state and Iowa, but took the title in his own name, and which had been transferred to the assignee; so that all she had ever received to be applied upon said sum was the \$1,267.22 above mentioned, which she claims should be applied thereon.

The way this proof is drawn, it throws very little light upon the real transaction as it appears from the evidence submitted on the hearing before me. And in order to understand the case and my conclusions upon the testimony, it becomes necessary to give a brief statement of the facts proven.

Col. Jones, the bankrupt, in November, 1845, married the claimant, a daughter of John Dunn, deceased, of the State of Kentucky, where the marriage was celebrated. The claimant's father died several years before that time, leaving a will by which he directed his executors to convert his personal property, except slaves, into money, to be equally divided between his son Frank and his four daughters, and when his daughters married, directed that the portion of such one should be put into her possession or into the hands of a trustee or trustees for her benefit, at the discretion of the executors; that as to the slaves, it provided that the executors should place an equal proportion of them in the possession of such daughter or into the hands of trustees for her benefit, or should continue to hire the same out for her benefit, and pay to her the hire yearly, but this distribution was not to

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take place until after the death of the wife of the testator, who was to have the use during her life. She died in 1850. Soon after their marriage they removed to Wisconsin, where they have ever since resided.

The share of each distributee under the will was ascertained, and settled June 13, 1852, to be \$2,079. The claimant's portion had all been paid to her before her marriage (and spent, according to the testimony), except \$100 paid to her Nov. 23, 1846, \$101.95, Dec. 1, 1846, \$100, Jan. 13, 1847, and \$453.14 paid to her husband in 1853. She receipted for the first three sums, and her husband for the last. There is no direct evidence as to what she did with the amount thus paid to her. She may have intended to have conveyed the idea in her testimony that she handed it over to her husband, but she does not say so, and what she does say in reference to it is so confused and uncertain that I cannot place any reliance upon it. Soon after the parties removed to this state, Col. Jones commenced buying real estate, and shortly became a very extensive land-owner, and as early as 1856 had the reputation of being a man of large property.

Among other property, he bought what was called the "Belmont Farm," consisting of about 1,300 acres of land, for which he paid, as appears by the consideration expressed in the deeds, about \$6,000. He lived upon and cultivated and improved this farm for several years before 1857, at which time he left it. He was elected Secretary of State in 1856, and in 1857 removed with his family to Madison, where he continued to reside for about four years. He bought a house in Madison valued at about \$3,000 or \$4,000. After his term of office expired he returned to Mineral Point, and continued to rent his farm aforesaid. In 1865 he sold this farm to one Owen Wright, for \$25,000—\$1,000 cash down, and notes and mortgage for \$24,000. These notes and mortgage were made payable to the claimant, Mrs. Jones, and, as I understand the case, the debt proven is based upon the idea that this mortgage and the money secured thereby became hers, and that as Mr.

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Jones afterwards collected the money and used it himself, she proves up against his estate the amount thus collected of principal and interest. On the hearing she predicated her right to the money upon the grounds, first, that the property was originally purchased and paid for with her separate property, upon the agreement or understanding that it should be hers; and second, that Col. Jones advanced and settled that amount upon her as and for her separate estate.

As to the first ground, it is sufficient to say the testimony is insufficient to support it. The portion of her separate estate received by her husband was only \$453.14, and that was in 1853, after the most of this land was bought, and as it cost about \$6,000, the insignificant amount of her separate estate would not go far towards paying for it. Indeed, the case is destitute of any satisfactory testimony to support this ground of her claim. Her own testimony, vague and uncertain as it is, does not establish a semblance of a case to sustain that ground.

As to the second ground, it is undoubtedly the well-settled law that a husband out of debt may settle upon his wife such portion of his estate as he pleases, if done in good faith, and not to defraud subsequent creditors.¹

So it becomes necessary to consider the testimony, and see whether this was in fact a settlement or not.

I do not think the evidence sustains the claim that this Wright mortgage of \$24,000, given for the "Belmont Farm," was intended as a settlement by the bankrupt upon his wife, and the evidence as above stated is altogether insufficient to show that the farm was originally purchased with her separate funds, as showing any reason for such an act on his part. There was no language used by any one at the time the mortgage was given, to justify the conclusion that it was designed as an advancement to her. The reason assigned by him for

¹ *Sexton vs. Wheaton*, 8 Wheaton, 229.

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taking the mortgage in her name, as Mr. Wright testifies, was that he was going South, and if he should die she could settle her own business better without having any administration about it, as he said he had seen considerable swindling in settling up estates, and Mr. Read, the counsel of the claimant, says he heard him say he took it in her name to secure her for the money he had that belonged to her.

This is all the testimony on that subject, except some vague statements of Mrs. Jones, and there is not enough evidence to support the claim that it was intended as a settlement of that amount upon her.

The subsequent conduct of the parties negatives also any such idea. It does not appear that she ever had the notes or mortgage in her possession. Col. Jones collected the money and used it as his own, deposited it with his other money in the bank, and purchased land with some of it and took the title thereto in his own name, and used it as he saw fit. About \$4,000 of it was paid to Mrs. Jones at one time in his absence; she gave a receipt for it in his name, and then deposited it to his credit in the bank. Over \$20,000 of that money was deposited with Mr. Henry, the banker, in Col. Jones' name, and no intimation was ever made to him, or to any one else, that it belonged to his wife, and neither of them kept any account of the time or amount of the payments. This conduct disproves the claim that it was intended as a *bona fide* payment to, or settlement upon, the wife, even laying out of view the claims of creditors. But when considered with reference to the rights of parties dealing with and crediting Mr. Jones, after that transaction, it presents a case that can not receive the approval of any court. She allowed him to collect, deposit, and use the money when collected as his own, and to enjoy the credit and reputation that the reception and use of the money necessarily gave him; and after parties have dealt with him, supposing and believing he was the owner of such money, she can not be heard to assert her right to it, and thus defraud honest creditors who have trusted him, relying upon the truth of ap-

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pearance of ownership which she permitted him to present. Nor is this all that militates against the verity of this claim. After he had gone into business and obtained large credit, and became embarrassed and unable to pay his debts, she, instead of asserting her claim, joined with him in deeds of conveyance of all his real estate to his children, and thus attempted to aid him in placing his property in the names of his children, to defraud his creditors, and keep it in the family, instead of trying to get it to pay her claim; and after he had thus fraudulently conveyed his property, he absconded, taking with him some considerable money obtained upon notes and securities of the firm of D. M. Platt & Co., which were transferred to him to collect and pay over to the creditors of that firm. As far as Mr. Jones is concerned, the evidence shows, beyond question, that he attempted to cheat and defraud his creditors, and the creditors of D. M. Platt & Co., out of their debts. Certainly, as to Mr. Jones, the fraud is clearly proven, and it is equally as plain that his wife co-operated with him in accomplishing it.

Neither of them pretended that she had a claim of this kind until after the scheme adopted to defraud the creditors by such deeds had been foiled by the institution of proceedings in bankruptcy.

But when it became apparent that the grantees in those deeds could not hold the lands from the creditors, this new claim or pretense was set up. Then it was first given out that he owed a debt to his wife for money he had received, belonging to her, and that this mortgage was intended as an advancement.

The case shows that they were not lacking in resources and schemes to accomplish what they had manifestly undertaken, *to wit.*, to defraud the honest creditors of Mr. Jones and of D. M. Platt & Co.

In arriving at this conclusion I have to disregard a good deal of the testimony of Mrs. Jones, but I feel justified in so doing. It is so contradictory, inconsistent, and unnatural in

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many of the most material points, that I feel compelled to reject and discredit it.

This brings me to a consideration of the claim, based upon the theory that Col. Jones received certain property and money belonging to her that came from her father's estate. The counsel for the assignee examined with a great deal of learning and ability, the will of Mrs. Jones' father, under which she received the property, for the purpose of showing that it was given to her directly, and not to trustees for her benefit and use; or, rather, to show that the executors had a discretion as to whether to deliver it to her or to her and her husband, and that, as the case showed they delivered to Mr. Jones, after the marriage, the portion belonging to her, they thereby executed that discretion in favor of the husband, and that it was not therefore to be regarded as her separate property, but as the property of Mr. Jones. In this case the parties were married before the Married Woman's Act of Kentucky was passed, and after the death of the testator. But I do not consider it important to pass upon those questions, for, as to a portion of the estate, she did not become possessed of it until after removal to this state, nor until after the Married Woman's Act was adopted here. Indeed as it appears, all that her husband received was after the passage of that act; and as by the terms of the will the executors were to convert the personal property into a fund, to keep it and distribute it, etc., I think the title remained in the executors until it was distributed, and if so, it did not come to her until after the passage of that act, which gave it to her free from the claim or control of her husband.¹ The counsel of the assignee claimed that the husband's right to it had attached before the passage of that act, and that the act, so far as his right was concerned, was unconstitutional, and cited to that effect the case of *Westerveldt vs. Gregg*, 12 New York, 202.

¹ *Barr vs. Sherwood*, 8 Bradford, 85.

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Without questioning the correctness of the doctrine laid down in that case, I think this case is distinguishable from it in this: In that case there was an unqualified bequest to the wife, and it was held that such a legacy was to be regarded as a chose in action, like a promissory note, and that, as a husband has a right to reduce his wife's choses in action to possession, and to assign them before so doing, that he had such a vested right as the legislature could not cut off, by declaring that it should be the separate property of his wife. But in this case the trustees were to first determine whether to pay the portion to the daughter or to trustees, or to her and her husband, and, hence, until they had exercised that discretion, the husband had no vested interest in it. The right of the husband was in abeyance, awaiting the decision of the executors upon this question, as to whom the money should be paid, and this discretion was not exercised until after the passage of the Married Woman's Act in this state. So I think, under the terms of this will, the husband had not such a vested interest in the wife's distributive share as the constitution would protect from the operation of that act.

But the case of *Westerveldt vs. Gregg, supra*, disposes of the claim for the amount of the Frank Dunn note. The evidence shows that Mrs. Jones, before she was married, loaned to her brother Frank \$136.80, for which he gave her his note, and that he afterwards paid it to Col. Jones. I think that the husband had such a vested interest in that note, by virtue of the marriage contract, that the legislature could not take it away from him, and declare it to be the sole and separate property of the wife, without violating the provision of the Constitution which declares that no person "shall be deprived of his property without due process of law." That being the case, it was his property, and he is not liable to her for it, nor can she prove the same against his estate in bankruptcy. The testimony further shows that on the 31st of March, 1863, \$182 was paid to Col. Jones by the executors, as his wife's share of the proceeds of certain lands

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belonging to the estate, which were sold by the executor. This, together with the \$453.14, paid in 1853, amounting in all to the sum of \$635.14, I think properly chargeable to the estate of D. W. Jones, and I authorize her to prove a debt for that amount against his estate.

The claim for the hire of her two slaves, from January, 1851, to December, 1865, when they were emancipated, I do not think is sustained by either the evidence or the law. It appears that in January, 1851, two slaves were apportioned to her, and that the executor kept them and hired them out for her benefit under the authority and directions in the will hereinbefore mentioned. The executor says they earned from \$100 to \$150 each annually, and that he remitted the proceeds after paying taxes and expenses to Mr. David W. Jones. These slaves were clearly her separate property, and the hire was for her benefit and use, but she permitted her husband to receive it and use it for a period of over fifteen years, and never kept any account of the amount or time of its reception, and, indeed, according to her testimony, she did not seem to have any idea of what this hire amounted to, for she swears it was \$500 a year, when, as before stated, it did not exceed \$250.

The doctrine in equity is too firmly established to be now questioned, that a married woman may bestow the income of her separate property upon her husband, at least, when done freely and without undue influence; and the rule is equally well settled, by a long and almost unbroken line of decisions in both this country and England, that where the husband, by the consent of his wife, is in the habit of receiving the income, profits and dividends of her separate estate, such facts and transactions are regarded as showing her voluntary choice to thus dispose of them for the use and benefit of the family, and the law will not require him to account therefor beyond the amount received during the last year.¹

¹ Story's Eq., § 1896; *The Methodist Church vs. Jaques*, 8 Johnson's Chancery, 1; *Parkes vs. White*, 11 Vesey, 225.

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This doctrine effectually disposes of the claim for hire of the slaves, and any claim for interest on the principal paid to her husband. But, as I have before said, the fact that no account was kept by either party of the amount of the money received from that source for so long a period, strengthens the presumption of the law that the wife intended her income to be used for the benefit of the family. In such case the law does not imply an agreement to repay it.

This rule, it will be observed, applies only to the income of her separate estate.

But for the amount of \$635.14, received by the husband as a part of the principal, I think a different rule prevails.¹

She admits in her proof that she has received notes and mortgages for \$1,267, to apply on her indebtedness. If so, the above sum of \$635.14 should be deducted from that, and she should pay the balance to the assignee; but I will not definitely determine that question at this time, but will leave it open for the claimant and assignee to make such disposition of it as they may deem just and proper. Her debt proven is ordered expunged from the list of creditors.

As this claim of the wife for the amount proven is so groundless and destitute of any semblance of justice or merit, I deem it but just, and as my duty to the creditors of the estate, to charge her with the costs of this proceeding, to be taxed, including a docket fee of \$20 to the attorney for the assignee.

See, further, as to the vested interest of the husband in his wife's property not defeasible by the "Married Woman's Act," *Briggs vs. Mitchell*, 60 Barbour, 288; *Ooombs vs. Read*, 82 Massachusetts (16 Gray), 271; *Quigley vs. Graham*, 18 Ohio State, 42. In Illinois the "married woman's law" has been held not to divest the husband of his estate by courtesy which had vested before passage. *Noble vs. McFarland*, 51 Illinois, 226.

The acquiescence of the wife in her husband's use of her estate as his own from twelve to nineteen years, without any accounting or memorandum, does not constitute such a trust or settlement as can stand against the rights of antecedent creditors. *Briggs vs. Mitchell*, 60 Barbour, 288.—[Reporter.

¹ *In re Bigelow*, 2 Bankrupt Register, 556; *In re Blandin*, 5 do., 80; *Jaycox vs. Caldwell*, 51 New York, 895.

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B. F. PERELES vs. CITY OF WATERTOWN.

CIRCUIT COURT.—WESTERN DISTRICT OF WISCONSIN.—APRIL,
1874.

CONSTITUTIONAL LAW—LIMITATIONS.

1. The Wisconsin Limitation Act of April 8, 1872, so far as it affects municipal bonds, issued before its passage, is unconstitutional and void.

2. In passing a statute of limitations, the Legislature must allow a reasonable time within which to prosecute existing causes of action; and as to what constitutes such reasonable time, the Legislature is not the exclusive authority. The period fixed by the Legislature is subject to review by the courts, and if they deem it unreasonable, they will disregard it as impairing the obligation of contracts.

3. A limitation to one year in municipal bonds issued for negotiation in a foreign market, is clearly unreasonable and unconstitutional.

This was an action brought upon certain bonds of the city of Watertown bearing date on the 1st day of August, 1853, and due and payable on the 1st day of August, 1863, bearing interest at the rate of 8 per cent., payable semi-annually according to interest warrants or coupons attached.

The facts and pleading appear from the opinion.

Vilas & Bryant, for plaintiff.

Daniel Hall and Harlow Pease, for defendant.

I. The act does not impair contracts, because it fixed a reasonable time to sue; *Ross vs. Duval*, 13 Peters, 45; *Ruehl vs. Voight*, 28 do., 153; *Wood vs. Hustis*, 17 do., 416; *Howell vs. Howell*, 15 do., 55; *Call vs. Hagger*, 8 Massachusetts, 423; Cooley's Constitutional Limitations, 366 *et seq.*

II. Construction given by state courts binds federal courts. *Leffingwell vs. Warren*, 2 Black., 599.

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HOPKINS, J.—The bonds are executed under the corporate seal of the city and are not disputed. The only defense interposed is that of the statute of limitations. When they were issued and put into circulation, the period of limitation was twenty years, and so remained until the passage of the act entitled, "An act to limit the time for the commencement of actions against towns, counties, cities and villages, on demands made payable to bearer," which was published and took effect April 3, 1872, and reads as follows, viz.: "Section 1. No action brought to recover any sum of money on any bond, coupon, interest warrant against, or promise in writing, made or issued by any town, county, city or village, or upon any installment of the principal or interest thereof, shall be maintained in any court, unless such action shall be commenced within six years from the time such sum of money has or shall become due, when the same has been or shall be made payable to bearer, or to some person or bearer, or to the order of some person, or to some person or his order; *provided*, that any such action may be brought within one year after this act shall take effect; *provided further*, this act shall in no case be construed to extend the time within which an action may be brought under the laws heretofore existing." ¹

This action was commenced by service of process, upon the 31st day of July, 1873, more than a year after the passage of the foregoing act, and more than six years after the bonds and coupons matured; indeed, more than six years had elapsed after the bonds and coupons had become due, when the act was passed, so if any right to sue was saved, it was by virtue of the *proviso*, "that any such action may be brought within one year after this act shall take effect."

This mode of inserting provisos of this kind in statutes of limitation intended to apply to existing causes of action,

¹ Laws of 1872, 56

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when the act would otherwise cut off all remedy, is quite customary in the legislation of this state. But notwithstanding it has been practiced for some time past, I do not find that the Supreme Court of the state has ever considered the effect of such provisions, or determined whether they are effectual in avoiding the constitutional objection to a law that cuts off all remedy. Such clauses have doubtless been suggested and inserted as embodying the principle laid down by the courts, that although a limitation act, by its terms, includes existing causes of action, still, if a reasonable portion of the period fixed remains after the passage, the act is not subject to the constitutional objection of impairing the obligation of the contract. But as to whether the legislature can determine that question by a proviso of this kind, has not been considered by the Supreme Court of this state; so I have not the benefit of the construction of that learned tribunal.

In the conclusion I have arrived at in this case, it will not be necessary to decide whether any effect should be given to such a proviso or not, for if it is effectual to give a year after the passage of the act to bring suits upon claims where six years had already run, still the legislature is not the exclusive judge of the question as to whether the period stated in the proviso is a reasonable time within which to prosecute the remedy.

This was the important question presented and discussed on the trial. Were it not for decisions of the Supreme Court of this state to the contrary, and I were at liberty to follow the rule the of Supreme Court of the United States, as laid down in *Sohn vs. Waterson*, decided October term, 1873, 17 Wallace, 596, there would be no difficulty, for they there hold that such statutes are to be construed as to existing contracts, as taking effect from their passage, and as giving the full period from that time. That would relieve this case from all difficulty, as the party would have the full six years after the passage in all cases. But, as the Supreme Court of this state, whose decisions upon such statutes are regarded as

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binding upon the federal courts,¹ have held that such statutes are valid, when there is a reasonable portion of the time left within which to commence the suit,² and that as to claims where the whole period had expired before the passage of the act, the statute does not apply at all,³ I have to decide this case in the light of such authorities. In *Sohn vs. Waterson*, *supra*, the act of the state of Kansas, passed in 1859, limited the bringing of actions upon judgments rendered out of the state, to two years from the time the cause or right of action accrued. The judgment there sued upon was recovered in Ohio, in 1854. So, to give the act its literal meaning, the right to sue the judgment in Kansas would have been cut off instantaneously. But the court held that the act should have prospective operation only, and that the proper time to commence the calculation of the period of limitations "was when the cause of action was first subjected to the operation of the statutes," and that the party had two years after the passage of the act to sue, citing and approving the cases of *Ross vs. Duval*, 13 Peters, 45, and *Lewis vs. Lewis*, 7 Howard, 776.

But the court, in *Murray vs. Gibson*, 15 Howard, 421, following the decision of the state courts of the state of Mississippi, in the construction of the statutes of that state, held that the statute applied only to cases arising after the passage of the act.

They did so, because of the deference that court pays to the construction of state statutes by the state courts. They regard their decisions in such cases as authoritative.

Conceding, for the purpose of this case, that the proviso operated to give one year to bring suits in cases otherwise out

¹ *Leffingwell vs. Warren*, 2 Black., 599.

² *Parker vs. Kane*, 4 Wisconsin, 18; *Smith vs. Packard*, 12 Wisconsin, 371; *Ruehl vs. Voight*, 28 do., 152.

³ *Osborne vs. Jaines*, 17 do., 573; and *Armond vs. The Green Bay and Mississippi Canal Co.*, 31 do., 316-342.

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off as this was, the question, as before stated, is presented whether the legislature have exclusive authority to determine what is a reasonable time to be allowed within which to commence an action or be barred. The courts of this state hold that they have the right, when a portion of the statutory time has run upon existing actions, to determine whether a reasonable portion of the time remains to enable the party to bring his action. But it was claimed by the defendant's counsel in this case that those decisions were based upon statutes where the legislature had not itself fixed the period, and hence were distinguishable from this case, for here the legislature had fixed the time for cases of over six years' standing, at one year, and that the courts were bound by that time as much as they were by the six years' time in cases where that was applicable; in other words, that the legislature had thereby fixed one year as a reasonable time, and the courts could not inquire into or question the wisdom of their decision in establishing it, and cited *Cooley's Constitutional Limitations*, page 366, in support of this proposition. The cases cited by Mr. Cooley as sustaining that doctrine, I do not think go to that extent, nor do I think he intended to. In *Call vs Hagger*, 8 Massachusetts, page 423, the court held that as the short statute was passed after the cause of action had accrued, it did not extend to the case. What was said upon the discretion of the legislature was therefore not necessary, and the decision was not placed on that ground.

The cases of *Stearns vs. Gittings*, 23 Illinois, 387, and *Price vs. Hopkin*, 13 Michigan, 318, do not present the question involved here. But the case of *Berry vs. Runsdall*, 4 Metcalf's Ky., 292, lays down a contrary rule, and holds that a limitation of thirty days upon existing causes, was unreasonable. The court did not regard the authority of the legislature to fix the time as absolute, but as subject to the control and judgment of the court. I think this the better rule. When the statute relates to causes of action accruing after the passage, it may be conceded that the power of the legis-

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lature is absolute in fixing the time within which an action shall be prosecuted.

In such cases, the parties are supposed to have contracted in reference to it, and the question of its impairing the obligations of the contract would not arise. But a very different rule applies to statutes of limitation intended to apply to existing causes of action. The legislature cannot directly impair the obligation of such contract, nor can it deprive a party of his property without due process of law.

The fixing of an unreasonable time to sue, is deemed an impairment; therefore holding that the legislature were the sole judges of what was reasonable time, is inferentially conceding to them the power of impairing, and even destroying, the obligation of a contract.

This seems to me to be the logical result of such a doctrine, and I cannot adopt it.

I think the time fixed by the legislature within which actions must be brought upon existing contracts, is not conclusive, but is subject to be reviewed by courts, and if they deem it unreasonable, it is their duty to disregard such statutes, as violative of the constitutional inhibition against passing laws impairing the obligations of contracts. A statute prescribing an unreasonably short time, is not a statute of limitation, but an unlawful destruction of a right, whatever it may purport to be by its terms. It was claimed that limitation laws were statutes of repose, and were now regarded with favor; they undoubtedly are; but they should allow citizens all needful remedies, and should therefore give a fair opportunity for all to apply to the courts for redress after their passage. The Supreme Court of this state have as directly passed upon this question as any court whose decision I have been able to find.¹ Dixon, Ch. J., says, "So far, then, as the Constitution of the United States reaches or affects the alterations of the remedy,

¹ *Von Baumbach vs. Bada*, 9 Wisconsin, 559-579.

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such alterations are, first, matters of sound discretion with the legislature; and, secondly, with the courts. The legislature, having power within the limits above stated, to control at their pleasure the remedy, and to determine for themselves whether parties to contracts are left, are, in the first instance, with a substantial remedy, according to the laws as they existed before such change, subject to a revision in the last particular by the courts." This fully sustains my opinion as to the authority of courts in such cases.

This brings me to the question whether the year allowed after the passage of this act for parties holding the bonds to bring suits was a reasonable time. I do not think, in view of the facts and circumstances of the case, that it was. That more time is essential in some cases than in others, is apparent.

These bonds were issued when it must have been known to the defendant that they could not be negotiated in this state, but would necessarily have to find a market in distant places, where money was more abundant than in a new country, and it is well known to all, and may properly be assumed by the court, I think, that the bonds so issued by these defendants, like the bonds of other municipal corporations, were negotiated in the money markets in this country, and perhaps of Europe, and that when this act was passed, a portion of them at least was held by parties residing out of the state. The time of limitation when the bonds were issued was twenty years, and when this act was passed, over ten years still remained for them to enforce their remedy. They had no reason, so far as this case shows, to apprehend any such legislation or any such great and extraordinary change in the policy of the state in its limitation laws. And their position did not impose upon them the duty of a constant watchfulness over the legislature, and they are not therefore chargeable with laches in not sooner finding out the existence of such law.

To hold the bar as valid under such circumstances, would be an act of great injustice to the holders of these bonds, and would greatly depreciate, if not absolutely destroy, the value

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of large quantities of securities of this character, contrary to the express protection guaranteed in the fundamental law of the land. Such legislation, instead of being regarded with favor, as claimed by the defendant's counsel, is subversive of vested rights, and tends to the destruction of confidence, and to encourage repudiation in violation of the plain letter and spirit of the federal and state constitutions.

Some evidence was given on the trial tending to show that just before the expiration of the year the executive officers of the corporation resigned, and that parties were unable to sue or get service within the year. And it was claimed by the plaintiff's counsel that if such was the case, the creditors had not a full year within which they could sue, and that such conduct on the part of the corporation would estop them from interposing the bar. But, in the view I have taken of the other question, it is unnecessary to pass upon this one. I prefer to put my decision on the broad ground that the act is void as not affording a reasonable time to sue after its passage.

The counsel for the defendant urged, with a good deal of energy, upon the attention of the court, the rule that courts would not pronounce a statute invalid as contrary to the constitution unless it was clearly so; that doubts upon that subject were not sufficient to justify a court in so doing.

I yield a most cordial assent to that doctrine. But when an act does, in the opinion of the court, contravene the fundamental law, no consideration, however important, can justify a court in enforcing it as valid. After the most thorough and deliberate consideration, I have come to the conclusion that the act of 1872 is unconstitutional and void, as to the cause of action set up here, and therefore order judgment for the plaintiff.

A statute limiting the time in which stockholders shall be personally liable to one year is reasonable and valid. *Adamson vs. Davis*, 47 Missouri, 268; *Same vs. Wilson*, id., 272; *Same vs. Marshall*, id., 273. See further, *Coffman vs. Bank of Kentucky*, 40 Mississippi, 29; *Hill vs. Boyland*, id., 618

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Burt vs. Williams, 24 Arkansas, 91; *Oose vs. Martin*, 44 Pennsylvania State, 322.

Where a right springs, not from a contract, but from a legislative enactment, the Legislature is the exclusive judge of the reasonableness of the time in which actions may be brought thereunder. *De Moss vs. Newton*, 81 Indiana, 219.—[*Reporter*.

JOHN O. WHEELER vs. GRANVILLE BATES.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS—MAY,
1874.

JURISDICTION.

1. **FORCIBLE ENTRY AND DETAINER.**—Since the Illinois statute of February 16, 1874, the U. S. Circuit Courts in that state have in proper cases jurisdiction of actions of forcible entry and detainer.

2. Such action is a "suit of a civil nature" within the meaning of the act of Congress of 1789.

This was an action of forcible entry and detainer to recover possession of certain lands in McHenry and Winnebago counties in this state. All the proper jurisdictional facts were alleged and admitted, save the right of the court to take jurisdiction of this form of action, on which ground defendant demurred to the jurisdiction.

Geo. F. Harding, for plaintiff.

Consider H. Willett, for defendant.

DRUMMOND, J.—I do not in this case propose to decide upon the sufficiency of the complaint, but only the question of jurisdiction. It is a right claimed under a recent statute in this state, and a question of some practical importance and it is known that under the prior statutes of forcible entry and detainer the proceedings were instituted before a justice of the peace, and the case could go from the justice of the peace to the courts of record, and so on to the Supreme Court of the state. On the 16th of February last the legislature passed

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a statute upon the subject of forcible entry and detainer, and gave jurisdiction to the courts of record of the state, on complaint in writing of the person entitled to the possession of lands and tenements being filed with any court of record or justice of the peace in the county where such premises were situated, setting out that the plaintiff was entitled to the possession of said premises, and that the defendant unlawfully withheld the same. The first section of the act declares that no person should make an entry in any lands except where it was allowed by law, and that he should not enter by force, but in a peaceable manner; and the second declares that the party entitled to the possession of the land may be restored, in a manner thereafter provided; and it states, under six heads, the circumstances in which restoration can be made.

The only question as to the jurisdiction of the court is whether the action authorized by this new statute is a civil suit within the meaning of the Judiciary Act of 1789. That act declares that circuit courts of the United States shall have jurisdiction where the matter in dispute, exclusive of costs, shall exceed the sum of five hundred dollars (provided the citizenship of the parties is such as to warrant it), and another section of the same act declares that where a suit is brought in a state court, and the amount in dispute shall exceed the sum of \$500, and the defendant against whom the suit is brought is a citizen of another state, he shall be entitled to remove the cause from the state court to the Circuit Court of the United States. It means suits of a civil nature, at law or in equity, so that the only question is whether this is a suit of a civil nature. If it is, notwithstanding it could not have been brought previously in the courts of the states, but was first authorized by this statute, if the citizenship of the parties was such as to warrant it, it could be brought in the Circuit Court of the United States, or, if brought in a state court, it could be transferred to the Circuit Court of the United States. It is impossible for the legislature of a state, by adopting new forms of proceeding and investing the state courts with ex-

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clusive jurisdiction of causes of action, to deprive the federal courts of the jurisdiction given by the acts of Congress, as this would place the jurisdiction of the federal courts within the control of the states. If, under the laws of the states, the citizens of the several states have a right to maintain a civil action, then the courts of the United States, in a proper case, also have jurisdiction.

This, then, is an action to recover the possession of land or buildings; it is a civil remedy; it can be maintained in the state courts; the plaintiff in this suit is a citizen of another state; the defendant is a citizen of this state; the amount in controversy is over 500 dollars. It is, then, within the jurisdiction of the federal courts, notwithstanding it is a new remedy which never existed before.¹

And for the recent act of Congress defining and enlarging the jurisdiction of the Federal Courts, see 7 Chicago News, 217.—[Reporter.]

¹ See *United States vs. Block* 121, Vol. 8 of this Series, 208, and the authorities there cited.

CHALKLEY J. HAMBLETON *vs.* THE HOME INSURANCE CO. OF NEW YORK.

CIRCUIT COURT. — NORTHERN DISTRICT OF ILLINOIS. — MAY, 1874.

IN EQUITY.

RENEWAL OF INSURANCE POLICY.

1. **AUTHORITY OF SOLICITOR.**—The insurance solicitor has no authority simply from the nature of his business, to bind the company to a waiver of payment of the premium.

2. **WAIVER, HOW SHOWN.**—Where by the terms of the policy a renewal is not binding unless the renewal premium be paid, the assured, claiming a waiver, must show either an express agreement to that effect or one arising by necessary implication from the facts and circumstances.

3. **WAIVER, WHAT CONSTITUTES.**—Where the partner of the agent of the assured tells the solicitor that if he will carry the risk and send him the bill, he will pay it, and the solicitor answers, "All right," and afterwards presents the bill at the agent's office, of which he has notice, but makes no effort to pay it, the whole transaction being neither reported to the regular agents of the company nor entered upon their books, there is no consummated contract of renewal, and no waiver of the payment of the premium.

This was a bill in equity to enforce an alleged verbal contract of renewal of a policy of insurance issued by the company on the second day of October, 1869, to indemnify the plaintiff for loss on buildings owned by complainant in Chicago, and destroyed by fire on the 9th of October, 1871.

The original policy provided that neither it nor any renewal thereof should take effect until the premium was paid by the assured. The original policy was given for one year, and was renewed from time to time, up to October 2nd, 1871.

W. T. Burgess, for complainant.

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Paddock & Ide, for defendant.

1. The testimony of the complainant's witnesses as to a contract to renew, is lacking in the certainty and clearness required by courts of equity in cases for specific performance, and, besides, is contradicted by Parsons, the solicitor of defendant, and Parsons is sustained by the circumstances, and by inferences resulting from the routine of the Chicago office. *Neville vs. Insurance Company*, 19 Ohio, 452; *Baptist Church vs. Insurance Company*, 28 New York, 161.

2. Parsons had no authority to bind the company, either by contract or waiver of conditions of the policy. Nor did the company hold him out in their course of dealing as having such authority. Renewal is, in effect, a new contract. *Winnesheik Insurance Company vs. Holzgrave*, 53 Illinois, 524; *Hartford Fire Insurance Company vs. Walsh*, 54 Illinois, 167.

3. No policy is delivered; the contract is incomplete. No credit was given, and no waiver of the condition requiring prepayment of premium. The policy made this a condition of renewal. *Flints vs. Ohio Insurance Company*, 8 Ohio, 501.

DRUMMOND, J.—It is claimed on the part of the plaintiff that this policy was renewed for another year from October, 2nd, 1871.

The facts seem to be that Mr. Dunning, of the firm of Dunning & Easton, was the plaintiff's agent for the property, the subject of the insurance.

Mr. Parsons, the renewal solicitor of the defendant, in September or October, 1871, called at the office of Dunning & Easton, but did not find Mr. Dunning in, and left without stating his business. The second time, he was asked by Easton what his business was, and he stated that it related to the insurance of the plaintiff. Mr. Easton told him that Dunning was absent in Michigan, and that if he would carry the

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risk and send him the bill, he would pay him the premium. Parson said that this was "all right." This is the statement made by Mr. Easton.

The premium for the renewal was never in point of fact paid, for the reason, as Easton says, that the bill was never presented.

Easton and another witness state that Parsons had a memorandum book with him, in which he appeared to make an entry at the time this conversation took place.

There does not seem to be much doubt but that these witnesses understood that Parsons had agreed to renew the insurance.

There is a conflict in the evidence as to the time when this conversation took place. According to Mr. Easton, it was about the 2nd day of October, 1871. According to Mr. Parsons, it was the latter part of September of that year.

Mr. Easton states that on the return of Mr. Dunning, he told him what had taken place between himself and Mr. Parsons, and Dunning said that he was glad of it, and that it was his purpose to attend to it.

Mr. Easton also says that he heard that Parsons afterwards had returned with a bill when he was not in his office. There is some conflict in the evidence as to the number of times that Parsons called at the office of Dunning & Easton. Some of the witnesses say it was three times, others that it was only twice.

Mr. Parsons says that at the second time when he called, something was said about the policy being renewed; that there was nothing definite done; that he made a memorandum in the book which he had, to the effect that he was to call and see Dunning when he returned; that Easton did not seem to have the right to order the insurance, and that he would not be responsible for the premium if the plaintiff did not want the insurance.

Both Mr Parsons and several of the officers of the company state that the practice was, whenever the solicitor of the

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renewals made his returns, to place on a file, called the "binding file," a note of the facts in such manner as to indicate that the contract was binding on the company. It is clearly shown that nothing of this kind was done by Parsons, and that there was no entry or memorandum of any kind made upon the books or papers of the company, and there is nothing except what took place with Parsons to affect the company as to the renewal of this policy. The memorandum book Parsons had in his hand at the time was destroyed by the fire.

When Parsons was spoken to after the destruction of the property, concerning the renewal of the policy, he did not seem to be perfectly certain upon the subject, though the impression on his mind was that the policy was not renewed. He made an effort to recollect all the policies that were renewed, as he says, but could not remember that this particular one was renewed.

After the property was destroyed the plaintiff tendered the amount of the premium to the officers of the company, by whom it was refused.

There are two questions arising upon this state of facts. One is whether there is any satisfactory evidence to show that Parsons was authorized to waive the payment of the premium, and to bind the company by giving credit on the same.

Parsons seems to have been simply a sort of clerk or agent, employed to solicit policies and renewals, and without any authority to bind the company, except such as might arise from the nature of his employment.

If even the question were to rest on the right of Parsons to bind the company by waiver of the premium, there is great reason for saying that there was no sufficient evidence shown to authorize him to bind the company.

But, secondly, I am of the opinion that, conceding his authority, there was no agreement by the company by which

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there could be said to be a waiver of the payment of the premium for the renewal due on the second of October, 1871.

If by the terms of a policy it is distinctly stated that it shall not be renewed except on the payment of the premium, it should then clearly appear before that condition can be said to be waived, that there was either an express agreement to that effect, or one arising by necessary implication from the facts and circumstances of the case.

It is a very common practice for insurance companies to waive the payment of the premium where its payment is a condition precedent to the existence of a policy, and to the continuance of it by renewal; and where it really appears that this has been done, either by facts expressly shown, or by necessary implication, the courts will enforce the obligations of the policy against the underwriter. But where this condition is annexed by express terms it is manifest that the only safe rule upon which reliance can be placed is to require the assured to furnish proof, clearly showing that the payment of the premium at the time was waived by the understanding or agreement between the parties; and it must appear that such was the understanding of both parties. It is not enough for the assured to understand the payment of the premium to be waived: the underwriter must also have so understood. In other words the minds of the parties must meet upon the subject matter of the waiver of the payment of the premium.

Undoubtedly this may be done by circumstances. Express words need not be used, but the circumstances must clearly show the understanding of the parties.

Now it was in this case incumbent upon the plaintiff to make out this waiver. He must show that the company agreed to waive the payment of the premium on the second day of October, 1871. It is not shown that Mr. Parsons or the company, or any of its authorized agents did make that agreement either in words or by necessary implication, and where an agreement is sought to be made out by such testimony as is here introduced, it is manifest that great stress

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should be placed upon the conduct of the parties at the time, because that may be decisive of the case.

It is said that Parsons, in reply to what was stated by Easton, declared that it was all right. That was an equivocal expression. It might be that he understood that the plaintiff intended to renew his insurance. It does not necessarily imply that he understood the company were at that time bound to extend credit upon the payment of the premium from the second of October, and the entry made by him in his memorandum book confirms this.

Again, it is said by Mr. Easton that he notified Mr. Dunning of what had taken place between him and Mr. Parsons, and that he (Easton) was told that Parsons had called with a bill.

Admitting the full effect of what is stated by Mr. Easton, was it the intention that Parsons was to call absolutely any number of times to obtain payment of this bill? Or, rather, was it not incumbent on Dunning or on Easton, if Parsons had called for the premium and it was not paid him, to make some inquiry on the subject, and not permit the premium to be in default on the day when it should have been paid? Or ought they to be permitted to take the chances upon so material a point?

If the company is to be bound in the case, it must be by the loose conversations and actions of a renewal solicitor without its knowledge, and of which it had no notice, and when there was nothing upon its books to show that a contract was made by it.

It seems to me that under the circumstances of this case the omission of Parsons to give the officers of the company any notice, the fact that no memorandum was placed on any of the books or papers of the company to indicate that there was a renewal, or that there was a credit given upon the premium, is confirmation strong that no one on the part of the

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company understood that an agreement had been made to waive the payment.

The bill will therefore be dismissed.

To support an action against an insurance company to compel it to issue a policy upon an alleged contract of insurance, such contract must be clearly proved. If the matter is left in doubt the suit must be dismissed. *Neville et al. vs. The Merchants' & Manufacturers' Mutual Insurance Co.*, 19 Ohio, 452; 2 Parsons on Contracts, 351.

The plaintiff, before he is entitled to receive payment or to sue for the loss, must present the notice and statements required by the company's policies. Angell on Insurance, § 226; *Colombian Insurance Company vs. Lawrence*, 2 Peters, 58; *Same vs. Same*, 10 Peters, 518; *Haff vs. Marine Insurance Company*, 4 Johnson, 132.

In a recent case in the Illinois Supreme Court, *The Lycoming Fire Insurance Company vs. Ruben*, reported in 8th Chicago Legal News, page 150; it was held that an insurance solicitor could not bind the company to a waiver of the conditions of the policy, and that he was the agent of the insured and not of the company.—[Reporter.

Main vs. Mills.

W. S. MAIN, ASSIGNEE, & CO., VS. SIMEON MILLS.

CIRCUIT COURT.—WESTERN DISTRICT OF WISCONSIN.—MAY,
1874.

1. **CAPITAL STOCK IS TRUST FUND.**—The capital stock of a moneyed corporation constitutes a trust fund for the payment of its debts, and its officers have no right to make a dividend unless there are actual profits over and above all losses.

2. **OFFICER CHARGEABLE WITH KNOWLEDGE—UNLAWFUL DIVIDENDS.**—An officer of the corporation is bound to know the condition of its affairs, and has no right to receive a dividend unless legitimately earned; if he does, it may be recovered by the assignee in bankruptcy.

3. **DIVIDENDS—WHEN UNLAWFULLY MADE.**—In deciding whether a dividend was rightfully made, the transaction must be viewed from the stand-point of that time, and not in the light of subsequent events. Notes or overdrafts by persons then considered abundantly good should not be counted as losses, because they afterwards proved such.

4. **STATUTE OF LIMITATIONS**—does not begin to run, in such a case, until the fraud is discovered by the assignee.

5. The general statute of limitations of Wisconsin does not apply to such a case, but it is controlled by §35, chap. 138, R. S. of 1858.

6. **STATUS OF ASSIGNEE.**—The assignee, for the purpose of this suit, stands precisely in the position of the corporation itself, and has no greater rights, nor does it make any difference whether there were but two stockholders or a larger number.

This was an action by W. S. Main, assignee of The Bank of Madison, to recover dividends claimed to have been wrongfully received by the defendant, while the bank was actually in an insolvent condition.

The facts are fully stated in the charge.

W. F. Vilas and *H. S. Orton*, for plaintiff.

Geo. B. Smith and *P. L. Spooner*, for defendant.

BLODGETT, J., charged the jury as follows:

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The controverted questions of fact to be passed upon by you are comparatively few. It is conceded that on or about the 16th of April, 1860, defendant Mills and one James L. Hill united under the general banking law of this state in the organization of a bank by the corporate name of The Bank of Madison, with a capital stock of \$25,000, of which each held one-half; that said bank commenced the transaction of the usual classes of business carried on in this city by banking corporations and bankers, and continued in said business until the 7th day of October, 1873, when it was adjudicated bankrupt in this court on its own petition; that up to about the middle of January, 1869, defendant continued to hold half the stock of said bank and acted as its president; that during the time aforesaid, said bank paid the defendant dividends on his stock as follows: January 1, 1865, \$6,084.66; January 1, 1866, \$1,630.37; July 1, 1866, \$1,740.28; January 1, 1867, \$3,003.65; July 1, 1867, \$815.55; January 1, 1868, \$2,088.14; July 1, 1868, \$1,565.57; January 1, 1869, \$1,014.91; and that dividends to the same amount were declared and paid to said Hill, who held the other half of the stock at the same time. It was also admitted that about the middle of January, 1869, defendant sold to said Hill his stock and interest in said bank at a price much below par. But I think it may be taken as an admitted fact that the stock was treated between the parties to this transaction, Hill and Mills, as of little intrinsic value at that time; that the defendant retained the presidency of the bank until January, 1871, although the evidence tends to show that his connection with it was merely nominal after he sold his stock.

It is also admitted that during the time the bank continued in business, regular reports of its financial condition were made as required by law to the bank comptroller of this state, and filed in the office of the secretary of state, and that these reports are mostly, if not all, signed, and purport to be sworn to, by the defendant as president.

The plaintiff has also given evidence tending to show that

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at the time these dividends were paid the capital stock of the bank had become so impaired by losses from bad debts and mismanagement that no actual profits were made from the business of the bank; that at the time when each of these dividends was paid the current losses of the bank by hopelessly bad and suspended debts were such as to have absorbed and sunk all the profits of the business, so that in fact no dividend was really earned and payable to stockholders.

Upon the facts thus admitted to be true or claimed to be proven, plaintiff insists that he is entitled to recover from defendant the dividends which he has from time to time received from January 1, 1865, to January 1, 1869, inclusive.

To this the defendant interposes by way of defense: 1. A general denial of the plaintiff's right under the law to recover upon the facts set forth in the complaint; 2. a denial of those facts, which puts the plaintiff upon proof of such as have not been admitted on the trial; 3. that as to part of said dividends the right of action accrued more than six years before the commencement of the suit, and is therefore barred by the statute of limitations.

It is the province of the court to instruct you upon some of these questions of law which arise upon the facts which you may find in the case.

There is, perhaps, at this day no better established rule of law than that the capital stock of a moneyed corporation, whether it be a banking, insurance, mining or manufacturing company, is to be treated and deemed as a trust fund for the purpose of securing the payment of the debts of the corporation. In banks the capital stock stands as a guaranty to the extent of its amount, for the payment of the creditors of the bank. Theoretically under your law this stock and a certain degree of personal liability of the stockholders is pledged, first to secure the payment of the circulating notes of the bank, and after that to the general creditors. But it being admitted that there is no circulation in this case, the general creditors may be said to be the parties directly interested in this fund.

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The officers of such a corporation have no right to make dividends to stockholders unless there are profits to be divided, over and above all losses, because the necessary result of so doing is to deplete the capital fund.

The capital stock being, as I said, a trust fund, the first duty of the officers of the bank is to keep this fund intact and unimpaired. If there are gains and losses, the gains should be set off against the losses so far as may be necessary to keep the capital fund whole. All net profits above what are requisite for that purpose, may, as a general rule, be rightfully divided to stockholders. And while it is not necessary for me to say in this case how far in my opinion a stockholder who is not an officer might be protected in the receipt of dividends, I will say that officers, who know and are bound to know the condition of the affairs of the bank, have no right to take dividends unless legitimately earned and on hand.

Applying these general principles to the case before us, you see that it becomes an important inquiry for you, and really the only material and important issue of fact for you to determine in this case, whether the bank had gains or profits which it rightfully could divide to its stockholders at the time the dividends in question were made.

You have heard the testimony bearing upon this branch of the case. The plaintiff has put in proof, which as he claims, shows that at the time each of these dividends was declared the losses, or suspended debts which ultimately proved to be losses, greatly exceeded the gains then on hand, and he therefore insists that those dividends were wrongfully made to the defendant and should be returned by him, because he, being an officer of the bank, was bound to know that these debts were either hopelessly lost, or so precarious and uncertain of collection that the bank had no right to consider them as part of its living available assets.

The defendant, on the contrary, insists that at the time these dividends were paid no serious losses had been sustained: that while some paper was suspended or overdue, and some

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accounts overdrawn, yet the debtors were all substantially solvent and good for their indebtedness to the bank. And it is for you to say whether the proof satisfies you that at the time any or all these dividends were paid the bank had made or had not made gains over and above its losses which authorized the making of the dividends.

If you are satisfied from the evidence that at the time these several dividends, from January 1, 1865, to January 1, 1869, were made, or either of them, the losses of the bank did at the time exceed the gains, so that in fact there were no profits over and above losses, then you should find for the plaintiff as to such of said dividends as you are satisfied from the evidence were made when there were no profits over and above losses to divide.

But in passing upon this testimony you must view it as far as possible from the standpoint of the transaction itself, and not in the light of subsequent revelations. The proper inquiry is, Would a sagacious, prudent banker, in the light of all the facts disclosed to you in the evidence, have considered Darwin, Parkins, and the other persons whose names appear in the testimony as debtors of the bank, as solvent, and the debts of the bank against them as good and collectible at the time these dividends were made?

From the nature of the business the assets of a bank must all the time be represented by what is due to it from its debtors. The officers of a bank cannot collect in all its bills receivable on some special day, and then say, Now we will make a dividend. We know we have no bad debts because no body owes us, and therefore we have a right to divide our surplus. This rule would be impracticable, and if acted upon would prevent any dividends being paid. But there is a constant demand for the exercise of sound judgment and sagacity as to the standing and value of its paper. The bank officer is not only bound to be honest, but he is bound to possess the requisite ability for the ordinary exigencies of the business he undertakes. He is not expected to be infallible, nor to make

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no mistakes, but he must use the caution of an ordinarily prudent man engaged in such business. Your own good sense and experience in life will teach you that it does not necessarily follow, because a man has overdrawn his account at a bank or has not paid his note at maturity, that the debt is therefore bad and should be charged up to profit and loss. It may be the overdraft is allowed because the bank officer knows, or thinks he knows, that the drawer is abundantly good, although it is probable that a banker who habitually, to any considerable extent, allowed overdrafts and overdue papers to remain unadjusted would soon lose his reputation as a safe and competent man in the business, and deservedly lose the confidence of the community. As I said before, you must as nearly as possible put yourselves in the place of the managers of this bank at the time these dividends were paid, and decide as well as the proof will enable you whether these debts now claimed to have been losses then, ought to have been so considered at that time by this bank officer and stockholder. Ought these debts to have been classed as doubtful or desperate at the time? If they ought, common prudence would have dictated the withholding of a dividend at such times. And if made at such times an officer of the bank occupying the responsible position in its affairs which was occupied by the defendant, would have no right to excuse payment of a dividend, because he is bound to know all the facts about its affairs which are disclosed by its books and records, or can be ascertained on close inquiry. He cannot be heard in a court of justice to say he did not know these things, because it is his duty to know them, and the law will conclusively presume he did know them.

From what I have said as to the facts you must find, in order to sustain the plaintiff's case, you will readily infer that unless those facts are found by you from the proof the defendant is not liable.

I come now for a moment to speak of the defense of the statute of limitations urged by the defendant. And upon

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this point I instruct you that the statute pleaded is a valid bar to the recovery in this case of all dividends which were paid more than six years before this suit was commenced.

This relieves you from the consideration of the circumstances surrounding the payment of all the dividends paid prior to January 1, 1868, but the rules I have laid down seemed equally necessary to the proper understanding of the rights of the parties as to those paid subsequent to that time, and I have therefore reserved the consideration of this branch of the defense to this time.

The bank, as a corporation, is bound to keep its capital stock intact, and the banking law has many provisions intended to secure that result. If there is any reduction of the capital funds, the bank can bring suit to recover back such funds, from those who have appropriated them wrongfully, and in case the bank refuses or neglects to do so, a creditor or person aggrieved may bring such suit, but the cause of action accrues to the bank and the statute begins to run when the misappropriation is made.

For the purposes of this suit the plaintiff, as assignee of the bank, stands just where the bank would have stood if it had brought the suit. His rights are no greater and no less. The bankrupt law has clothed him with no special powers in regard to this claim. It originated, if at all, long before any act of bankruptcy was committed, and it is undoubtedly true, as a practical fact, that while the management of the bank remained in the hands of those officers who had declared and received the dividends in question, it is equally true that the right of action accrued to the bank as a corporation on the wrongful receipt of each dividend shown in the proof to have been taken by the defendant when there were no profits. This right of suit accrued to the bank as a corporate entity, because of the reduction of its capital stock, which it was bound to keep whole, and the plaintiff in this case has, in my opinion, only succeeded to whatever right of action the bank itself had, and therefore the statute applies in this case.

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The fact that Mills and Hill were the only stockholders and only officers in this bank, does not change the legal aspect of the questions raised in this case. A bank corporation is just as much an artificial body, and has the same rights and duties, with two stockholders as though it had a hundred stockholders. The ownership of the stock in a bank, under the law of this state, is a fact of which any person can, by due inquiry, obtain information. The law requires lists of stockholders to be filed semi-annually in the office of the State Bank Comptroller, and in the office of the Register of Deeds of the county where the bank is situate, so that all depositors can ascertain, not only who the stockholders were, but how many there were.

The reports were only admissible to show the act of defendant in representing the stock as remaining intact, and also as tending to show the extent to which he participated in the actual management of the bank affairs.

Much testimony has been admitted on the trial of this case which, perhaps, was not necessary to elucidate the issues on which you are to pass. I have already called your attention to these issues, and it is enough to say that you ought not to consider in this case any testimony which does not tend to prove those issues.

Verdict for amount of dividends paid out after January 1, 1868, with interest.

On error to the Circuit Court (Drummond, J.), this case was partially reversed on two grounds, no written opinion being given.

1. It was a fraud on the depositors of the bank, for Mills and Hill the sole stockholders and managers to divide between themselves, under the name of profits, money belonging to the capital or to the depositors, when no profits were in fact made. The fraud was not discovered until the failure of the bank and the appointment of an assignee, but was concealed from the depositors by Mills and Hill. The statute of limitations did not begin to run till the fraud was discovered by the assignee, and this on general principles of law.

2. The "six years" statute of Wisconsin did not apply to the case, but the 86th Section of Chapter 138 (2 Taylor's Revised Statutes of 1871, page

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1628), which declares that "the title" shall not affect actions against directors or stockholders of a moneyed corporation or banking associations, to recover a penalty or forfeiture imposed, or to enforce a *liability created by law*, but such actions must be brought within six years after the discovery by the aggrieved party. If the facts upon which the penalty or forfeiture attached, or the liability was created.

Judge DRUMMOND held that it was not material how the liability was created, whether by statute or by the general principles and usages of law. The point first decided was afterward affirmed by the Supreme Court of the United States, in the case of *Bailey vs. Glover*, 21 Wallace, 342.

See the case of *Gratz vs. Redd*, 4 Ben Monroe, 178, as to dividends wrongfully paid.

The charge of Judge BLODGETT was not otherwise disapproved, and the case was remanded for computation of the full amount of the dividends thus unlawfully received, judgment to be entered accordingly.

See further, that payments of dividends out of capital are not legal unless specially authorized by the statute, *Painesville & Hudson R. R. Co. vs. King*, 17 Ohio, St., 534; *Pittsburg & O. R. R. Co. vs. Allegheny County*, 63 Pennsylvania St., 126. For a discussion of the point that the capital stock is a trust fund for the creditors, see Angell & Ames on Corporations, 475, 2d Ed; *Scammon vs. Kimball*, Vol. 5 of this Series, p. 431.—[Reporter

THE PEOPLE OF THE STATE OF ILLINOIS vs. THE
CHICAGO AND ALTON RAILROAD COMPANY.

CIRCUIT COURT.—SOUTHERN DISTRICT OF ILLINOIS.—JUNE,
1874.

The United States Circuit Court has no jurisdiction of a writ of *certiorari* to a state court for the removal of proceedings by the state against a railroad company under the Illinois act of May 2, 1873.

Motion to quash a writ of *certiorari*. The state of Illinois commenced in its own name by the attorney-general, in the Circuit Court of Sangamon county, a prosecution against the defendant, a corporation chartered by the state, for violation of the act of Legislature, of May 2, 1873, entitled "An act to prevent extortion and unjust discrimination in the rates charged for the transportation of passengers and freights on railroads in this state, and to punish the same," etc.¹

After the action was commenced, the defendant, in vacation, filed a petition, verified by affidavit, with the clerk of this court, which alleged, in substance, that the railroad company claimed rights, privileges and immunities secured by the Constitution of the United States, and that, under the color of the act of this state above mentioned, the company was subject to be deprived of the same, and asking for a writ of *certiorari* to the state court, where the action was pending. The clerk accordingly issued the writ of *certiorari*, requiring the state court to send to this court the record and proceedings in the cause.

¹ R. S., 1874, p. 816.

State of Illinois vs. C. & A. R. R. Co.

The motion was heard before DAVIS, DRUMMOND AND TREAT, J. J.

Corydon Beckwith, P. S. Edwards and Milton Hay, for the company.

James K. Edsall, attorney-general, *J. Milton Palmer* and *William M. Springer*, for the state.

DRUMMOND, J.—The question now made is whether the court has jurisdiction of the case. It is claimed to exist under the first section of the act of Congress of April 20, 1871,¹ which is as follows:

“Any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any state, shall subject, or cause to be subjected, any person within the jurisdiction of the United States, to the deprivation of any rights, privileges or immunities secured by the Constitution of the United States, shall—any such law, statute, ordinance, regulation, custom or usage of the state to the contrary notwithstanding—be liable to the party injured, in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the 9th of April, 1866, entitled, etc., and the other remedial laws of the United States which are in their nature applicable in such cases.”

It is insisted by the counsel of the railroad company that the language of this section includes all persons of every class within the jurisdiction of the United States; that it comprehends any rights, privileges or immunities secured by the Constitution, and any one of the amendments, and that the

¹ 17 U. S. Statutes at Large, 13.

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corporation is a person representing and acting for all the members of which it is composed, and for the rights, privileges or immunities secured to them as such. Now, if it be admitted that this is the true construction of the act of April 20, 1871, and if it be conceded, further, that the state was prosecuting an action of debt for a penalty which could not be imposed without causing the company to be subjected to the deprivation of rights, privileges and immunities granted by the constitution, the question is whether the cause could be removed from the circuit court of Sangamon county, so as to authorize this court to take jurisdiction.

The reason urged is that the act of the legislature under which the penalty is sought to be imposed impaired the obligation of the contract which the state made with the company by its charter. If this were so, has Congress authorized the transfer of a case from the state to the federal courts in such a contingency? It must satisfactorily appear that this has been done.

There can be no doubt that Congress can vest any jurisdiction, authorized by the Constitution, in the federal courts, either originally or by transfer from the state courts. But prior to the act of April 20, 1871, that clause of the Constitution which prohibits a state from passing any law impairing the obligation of contracts, when involved in a suit pending in a state court, and the decision of the court was in favor of the validity of such a law, could only be construed by the federal courts by writ of error under the 25th section of the Judiciary Act. Has the act of April 20, 1871, changed this? If so, it must be by express words or by necessary implication. The first section of the act of 1871 declares that the person doing the injury under color of the state law shall be liable to an action at law, suit in equity or other proper proceeding for redress. It will be observed that then the words "action at law and suit in equity" are omitted, and the language is "such proceeding to be prosecuted in the several district and circuit courts of the United States."

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There can be no doubt that the action at law and suit in equity referred to are original actions and suits to be commenced in the district or circuit courts, and it would seem not an unfair construction to hold that "other proper proceeding" should follow the principal words used, and should also be referred to any original proceeding other than such as might be properly termed an action at law or suit in equity; and when they were prosecuted in the district or circuit court they were to be subject to the same right of appeal, review upon error, and other remedies in like cases provided under the act of April 9, 1866, and other remedial laws in their nature applicable in such cases.

Now the argument is that because in some of the statutes here referred to provision is made, under certain circumstances named in each case, for a transfer of the case from the state to the federal court, this cause can, therefore be transferred. We are not prepared to admit the conclusion. On the contrary, we think that if the first section of the act of 1871 were intended to authorize the transfer, more explicit language would have been used. Undoubtedly that section in the case named intended to confer on the circuit and district courts original jurisdiction, but full effect can be given to the section by applying the words used to original "actions at law, suits in equity, or other proper proceeding;" and "like cases," may well mean cases originally brought in such courts, namely, the district and circuit courts of the United States. The case is not then within the rule already stated.¹

The transfer of this case to this court is not authorized by express words or by necessary implication. We think, therefore, this court has no jurisdiction of the case, that the writ should be quashed, and the suit remanded to the Sangamon Circuit Court.

Cause remanded.

¹ See *Gaughan vs. Northwestern Fertilizing Co.*, 8 Bissell, 485.

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In case of *Winnall vs. Chicago & Alton R. R. Co.*, not reported, involving same question, Supreme Court of United States dismissed an appeal on the part of the company on the ground that the proper remedy was by *mandamus* and not by appeal.

Since the rendering of above decision Congress has enlarged the jurisdiction of the Federal Courts. Act of March 3rd, 1875, 7 *Chicago Legal News*, 217.—[Reporter.

HENRY J. MCFARLAND vs. CHARLES GOODMAN
et al.

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—JUNE,
1874.

1. **HOMESTEAD.**—Where a conveyance of the homestead, executed by a bankrupt and his wife, has been set aside at the suit of the assignee in bankruptcy, the homestead rights remain, and the assignee holds subject to them.

2. **DECREE—PRIVITY.**—A decree declaring such conveyance fraudulent and void, and requiring the defendant to convey to the assignee, does not establish title in the assignee under such defendant, nor any privity between them.

3. **ESTOPPEL.**—The conveyance by the bankrupt and wife works no estoppel in favor of the purchaser from the assignee, and he has no title to support ejectment.

4. **DOWER AND HOMESTEAD RIGHTS**—are governed by the same rules and principles.

James G. Jenkins, for plaintiff.

Levi Hubbell and *Wm. P. Lynde*, for defendants.

HOPKINS, J.—This is an action of ejectment for the recovery of forty acres of land, which is in the possession of and

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claimed by Gaius Munger and Celia his wife, as a homestead. The validity of that claim is the principal question, and the result of the case depends upon its determination.

Under the issue joined herein, it is necessary for the plaintiff to establish his title and right to possession.

Ejectment is a possessory action to the extent that the right of possession to the premises, on the part of the plaintiff, at the commencement of the suit, is essential to a recovery. Title without right of possession is not enough. It is a maxim of universal application in ejectment, that the plaintiff must succeed upon the strength of his own title, and not upon the weakness of his adversary's. So a plaintiff fails unless he shows title in himself, irrespective of the question of the validity of the defendant's title.

The solution of the principal question depends almost wholly upon the effect of the deed of Gaius Munger and wife to Isadore G. Munger, their daughter, bearing date on the 2d day of December, 1869, which was subsequently set aside and vacated, in a suit in equity prosecuted by the assignee of Gaius Munger in bankruptcy, against Isadore, the grantee, on the ground that it was fraudulent as to creditors.

The plaintiff derives title to the land under a deed from the assignee; so, if the bankrupt's homestead right was not cut off by the deed, or if the right to assert it revived and reverted to him and his wife, on setting aside their deed, then his claim of title thereto must fail.

From the evidence, it appeared that the land in question had been occupied by Gaius Munger and his wife as a homestead for over thirty years; that, connected with it, were about four hundred acres more, which had been used as a farm up to the 2d of December, 1869, when they conveyed the whole to their daughter Isadore G., as above stated; that the only money consideration was \$100, but it was agreed between them that Gaius and his wife were to continue to occupy the premises as a homestead during their natural lives, and were to be supported by Isadore during their joint lives; that, soon

after executing the deed, proceedings in bankruptcy were instituted against Gaius Munger, which resulted in his being declared a bankrupt, and the appointment of an assignee of his estate; that the assignee, soon after his appointment, filed a bill in the district court of this district against Isadore G. Munger, to set the deed aside as fraudulent and void as against the bankrupt's creditors, which resulted in a decree, bearing date on the 5th of February, 1872, declaring said deed to be fraudulent and void as to the creditors of said bankrupt and the complainant, his assignee, and setting aside and wholly vacating it, and declaring that the defendant Isadore, as against the complainant therein, acquired no right or title to, or interest in, the premises, or any part thereof, by virtue of such deed, and declaring that the premises were the property of the complainant as assignee in bankruptcy, and also decreeing that Isadore convey them to the assignee upon demand; but no conveyance had been made by her before the trial of this suit.

There was no question made in that suit upon the homestead question or right of Gaius Munger and his wife, nor was any decision made upon that point therein.

After the entry of said decree, an application was made before the district court, sitting in bankruptcy, by Gaius Munger, to have the homestead set off; but it does not appear that any definite decision was ever made upon that application, except that the assignee, in obedience to the instruction of the court, sold the real estate, subject to any legal claim of the said Gaius Munger to a homestead therein; which sale the court confirmed.

The defendant, Gaius Munger, gave notice of his claim to this property, at such sale, as his homestead; and, after the confirmation, the plaintiff, with full knowledge of such claim of Gaius, took the assignee's deed of all the premises conveyed to Isadore, which covered the premises involved in this suit.

The assignee's deed did not contain the reservation or ex-

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ception as to Gaius Munger's homestead rights, but the counsel for the plaintiff consented on the trial to treat it as containing such exception or reservation.

The plaintiff obtained possession of all except the part in controversy here. Gaius and Celia his wife claimed their homestead exemptions under the state laws, and refused to surrender possession of that part.

By the state statute there is exempted to a debtor forty acres of agricultural land, or a quarter-of-an-acre lot in a city or village, owned and occupied by such debtor as a homestead.

The owner of such homestead cannot alien it unless his wife join in the deed. The deed of the husband alone is void.¹ The separation of the land by a highway running through it, does not defeat the homestead claim, provided it is all in one body.²

His right to it as a homestead, up to the time of the deed, is not questioned. The possession, after the deed, continued as before. The agreement that he should so enjoy it, was faithfully kept.

That deed being set aside and vacated as to the assignee, the question arises as to the extent of the assignee's interest. Had the assignee any greater interest in the land than he would have had if the deed had not been given?

Section 14 of the bankrupt act invests an assignee with the title "to all property conveyed by the bankrupt in fraud of his creditors." Property so conveyed is considered as still belonging to the bankrupt, and passes the same as if the title had not been changed.

The assignee takes such property under and by virtue of the bankrupt act, not under or through the grantee; and if he takes title under the bankrupt act, why cannot the bank-

¹ *Hait vs. Houle*, 19 Wisconsin, 472.

² *Bunker vs. Locke*, 15 Wisconsin, 635.

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rupt assert the exemptions and rights secured to him by the act? The 14th section, after providing for an assignment of the property of the bankrupt, declares that there shall be excepted from execution sale "by the laws of the state in which the bankrupt has his domicile," and "that such exceptions shall operate as a limitation upon the conveyance of the property to his assignee." It operates like a general execution, in favor of all creditors, and takes all property subject to levy, and only such as may be made available upon judicial process to the payment of debts of the bankrupt.¹

These provisions and restrictions, it seems to me, apply to all property that passes to the assignee under the act, including such as has been transferred to defraud creditors, as well as that where the title is ostensibly in the bankrupt. If so, he takes no greater interest in the one case than in the other. The limitation applies to all he acquires under the bankrupt act, and he cannot be heard to deny the bankrupt's title to property which he receives and claims through and under the operation of the bankrupt law. He cannot deny and affirm the bankrupt's title at the same time. The real estate covered by the annulled deed having been treated as the bankrupt's property, I think it must be considered, as to the plaintiff in this case, as such, and subject to all the rights of the bankrupt and his wife reserved to them by the bankrupt law. This construction gives effect to all the provisions and limitations of section 14, and secures to all parties their rights.

But, in view of the facts of this case, this construction is eminently just, for it was agreed that the grantors, who were old and feeble, should, notwithstanding the deed, occupy this property as their home and be supported there by the grantee during their lives.

¹ *In re Deckert*, 10 National Bankruptcy Register, 1.

The deed, under such circumstances, did not extinguish their homestead rights.¹ That agreement they could enforce, as against their grantee, and a court of equity would set aside the deed in case of her refusal to perform it.

So that the equitable right of the bankrupt to this property as a homestead had not been unconditionally surrendered, or placed where he could not enforce it against his grantee, if the deed had not been annulled in the interest of the creditors. But I do not wish to be understood as resting my decision on this ground alone. I think the bankrupt's homestead rights sustainable upon broader and more comprehensive grounds. The deed being set aside, and the creditors restored to their rights as they existed before the deed, upon what principle should the bankrupt be denied his rights, as they were before the deed? In the case of a homestead, there is a peculiar reason for the adoption of this rule. The homestead is exempted for the benefit of the family of the debtor; he cannot deprive them of it without the signature of his wife. To transfer it, requires their joint deed. Her right in it is not simply inchoate, like dower, but present, possessory and indefeasible by her husband. Neither can convey it except by joining with the other in the deed. A defective deed, or deed inoperative and void, as to either, is in my opinion ineffectual and void as to both, and does not convey any title.

It was said that she voluntarily executed this deed with her husband; that she probably knew of his unlawful purpose. Suppose that to be the case, I do not think it alters her rights. The position of a wife is such, and the influence of the husband over her, that she is not held answerable for his frauds.

Homestead laws are now favorably construed by courts, as in the interest of the debtor's family. In support of this proposition, I need only refer to the enlightened decisions of our own state Supreme Court.

¹ *Murphy vs. Crouch*, 24 Wisconsin, 365.

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That court has decided that a deed of the homestead cannot be set aside as fraudulent as to creditors; for the reason that, as the creditors had no right to have it applied in payment of their debts while in the possession of the debtor, they could not be defrauded by its conveyance, and could not follow or reach it in the hands of the alleged fraudulent purchaser.¹

If the assignee claimed under this deed, or could claim under it, a different result would follow. But he does not: he acquired the bankrupt's title by operation of law, in hostility to the deed. He has no privity of estate or connection of any kind with the grantee. He cannot maintain it to be both good and bad. The law allows no such paradox. Nor can he enforce the grantee's rights, if she have any, as was contended by the plaintiff's counsel on the trial. I am aware that the decisions of the courts are not entirely in accord on this question; but the conclusion I have reached is not without the support of many well-considered opinions of other courts, federal as well as state. A different rule might apply to personal property, for the wife in this state has no interest in that, or right to prevent its disposition by the husband, so that the same reason for her protection in the use of that, does not exist; but I do not determine upon that question. This action relates to the homestead exemption, and my decision is not intended to go beyond that question.

Judge Dillon, in *Cox vs. Wilder et al.*, 7 Bankruptcy Register, 241; s. c. 2 Dillon, 45, examined this question and the kindred one of dower, and decided that a deed executed by husband and wife to defraud creditors did not bar the wife's dower, nor defeat her right to the homestead under the laws of Missouri. The same doctrine substantially is laid down in *Woodworth vs. Paige*, 5 Ohio State, 70, and by Judge Withers, in *In re Pratt*, Central Law Journal, Vol. 1, p. 290.

¹ *Dreitzer vs. Bell et al.*, 11 Wisconsin, 114; *Pike vs. Miles*, 28 id., 164.

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This brings me to the consideration of the effect of the decree in the suit of the assignee against Isadore Munger.

If Gaius Munger and his wife had been parties to that suit, and such a decree had been entered, they would have been concluded; but not being parties, they are not affected by it. But if they had been joined in that suit, they could have set up their homestead claim; and, if they had, according to decision in *Dreutzer vs. Bell, et al, supra*, the deed as to the homestead portion would not have been declared void; the title to the homestead portion would have been confirmed in their grantee, and, as between her and the bankrupt and his wife, it was to continue to be their homestead during their natural lives. They, in that case, would have had the full benefit of their right under the statute. But the assignee omitted to make them parties, and took a decree annulling the deed as to the whole land embraced in the deed, without reservation.

The decree doubtless estops Isadore and all persons claiming under her, from ever setting up any title to any portion of the premises, under that deed, as against the complainant and those claiming under him. It, as before said, not only declared the deed void and that she acquired no title under it, but it required her to convey to the assignee all her right and title. This clause, except for some others which most emphatically declare that she acquired no title, might be considered as conceding some title in her; but I think such is not the fair construction. It was inserted for greater caution, and only to quiet the title against the deed; not meaning that she was to transfer an independent substantial title. Thus interpreted, it is consistent and not contradictory, and does not establish any title in the assignee under her, nor any privity between her and the assignee. In the case of *Winship vs. Lamberton*, referred to by Judge Thurman, in *Woodworth vs. Paige, supra*, the decree set aside the deed as fraudulent as to creditors, and required the fraudulent grantee to convey to assignee or receiver, like the one under considera-

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tion. The wife joined with her husband in executing the fraudulent deed in that case as in this, but the court held that neither the deed nor decree barred her dower; that the clause in the decree requiring a conveyance was not meant to pass an independent title, but simply to quiet the title against the deed; and the widow was allowed her dower, notwithstanding she had signed the deed, the court holding that the annulled deed could not be interposed to defeat her dower. If such a deed and decree annulling it, do not defeat a widow's right of dower, upon what ground can it be maintained that they estop the widow from asserting her claim to the homestead? There is nothing in the nature of the rights to cause any difference, and I think if she is not estopped as to her dower-right, she is not as to her homestead.

But there is another difficulty in the plaintiff's way, upon the theory contended for. He is neither a party nor privy to this deed; and the rule is well settled that a stranger cannot set up an estoppel, because there is no reciprocity. Estoppel only binds parties and privies; so that, unless he derives title under the deed, he cannot assert the rights of the grantee under it.¹ Again, in *Morton vs. Noble*, 57 Illinois, 176, it is said, "We fully recognize the doctrine, that when the deed from the husband and wife becomes inoperative as to the husband's estate, because made in fraud of the rights of the creditors, * * * or by reason of any wrongful act on the part of the husband, the wife is not barred by the deed."

If this is the true doctrine as to the dower right, and there is no distinction between dower and homestead rights, these authorities effectually dispose of the case. They clearly support the claim of the defendants, Gains Munger and Celia Munger to the property as a homestead, and decide, that as against the assignee, who took in hostility to their deed, they are not estopped by it; but as against him they can maintain their ex-

¹ *Pisley vs. Bennett*, 11 Massachusetts, 298.

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emptions, and also that the decree against Isadore does not affect them, and that the assignee does not derive any new title as against them therefrom.

Such being the rights of the parties as against the assignee in bankruptcy, the plaintiff who purchased of the assignee, and with full knowledge of the condition of the estate and claims of Gains Munger, occupies no better position than the assignee. By the deed he succeeded to the rights of the assignee only; and, as I have determined that the defendants are entitled to their homestead exemption as against the assignee, the title of the plaintiff to this property, it being their homestead, has failed, and the plaintiff has failed therefore to show title to the property in controversy.

I therefore find that the plaintiff is not the owner of the premises described in the complaint, nor is he entitled to the possession thereof; and direct judgment in favor of the defendants with costs.

The waiver of the Homestead right in favor of a particular creditor does not inure to the benefit of the assignee or other creditors. *In re Poleman*, Vol. 5 of this Series, 526.

The Homestead Exemption does not protect a debtor in property fraudulently acquired, and its privileges may be forfeited by fraud. *Pratt vs. Burr*, Vol. 5 of this Series, p. 36.—[Reporter.]

PHEBE N. FIELD vs. THE INSURANCE COMPANY
OF NORTH AMERICA.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JUNE,
1874.

1. **OVER-VALUATION FOR INSURANCE.**—A provision in a policy that “if the insured shall cause the property to be insured for more than its value, the policy shall be void,” only avoids the policy in case of intentional over-valuation or fraudulent concealment. This is particularly true where an agent of the company was requested to examine the property, or had an opportunity so to do.

2. **BURDEN OF PROOF,** is upon the company to show that the over-valuation was intentional.

3. **CONDITION OF TITLE—ESTOPPEL.**—Though the policy provides that if the property is leasehold, or held otherwise than by absolute ownership, it must be so represented to the company and expressed in the policy, or the insurance will be void, yet if at the time of issuing the policy the agent of the company knew the actual condition of the title to the property, and failed or neglected to make the proper note in the policy, it cannot be avoided on that ground.

4. **PROOFS OF LOSS.**—If these are presented in apt time, and are substantially in compliance with the requirements of the policy, that is sufficient, unless the company asks for more specific proof.

5. **WAIVER OF PROOFS.**—If the adjuster of the company, after examining the premises, stated to the insured that the company was not liable, on the ground of the invalidity of the policy, such facts may be considered as a waiver of the proofs of loss.

6. **OWNERSHIP OF INSURED PROPERTY.**—If the property was insured as belonging to the wife, and the ownership lies between the husband and wife, and the former is estopped from claiming it, then the title is sufficient in the wife to support the action on the policy.

7. **VALUE OF INSURED PROPERTY** is for the jury to determine.

8. **INTEREST,** may be allowed after the expiration of sixty days from the furnishing of proofs of loss.

Bennett, Kretzinger & Johnson, for plaintiff.

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1. When the agent of the insurance company is advised of all the facts at and before the policy is issued, and the agent makes out the application and policy, the company are bound, notwithstanding the errors of the agent in writing the application, or the failure to state all the facts in the application, or to comply with a condition in the policy requiring an indorsement on the policy. *Flanders on Fire Insurance*, 100, 101, 198. *Hough vs. City Fire Insurance Company*, 29 Connecticut, 10-22; *Peck et al. vs. The New London Insurance Company*, 22 Connecticut, 584; *Commercial Insurance Company vs. Spankneble*, 52 Illinois 56; *Atlantic Insurance Company vs. Wright*, 23 Illinois, 462, 572; *New England Fire Insurance Company vs. Schettler*, 38 Illinois, 166; *North Berwick Co. vs. New England F. & M. Insurance Company*, 52 Maine, 336.

II. The doctrine of estoppel is applied in such case. *Plumb vs. The Cattaraugus Co. Mutual Insurance Company*, 18 New York, 393; *Flanders on Insurance*, 180, 1 to 5 in. *Beal vs. The Park Fire Insurance Company*, 16 Wisconsin, 241, 246; *Frost vs. Saratoga Mutual Insurance Company*, 5 Denio, 156; *Rowley vs. The Empire Insurance Company*, 36 New York, 550; *Insurance Company vs. Wilkinson*, 13 Wallace, 232; *Connecticut Insurance Company vs. Goss et al.*, 56 Illinois, 402.

III. Upon the question of valuation. *Flanders on Fire Insurance*, 58, note 2; 59, note 1; *Williams vs. New England Mutual Fire Insurance Company*, 31 Maine, 219; *Fuller vs. Boston Mutual Fire Insurance Company*, 4 Metcalf, 206; *Holmes vs. Charleston Mutual Fire Insurance Company*, 10 Metcalf, 211; *Insurance Company of North America et al. vs. McDowell et al.*, 50 Illinois, 120, 127.

IV. When suit to recover for a loss is defended on other grounds than that the proof of loss was not sufficient, objections to the proofs are waived. *Flanders on Fire Insurance*, 518. *McMasters et al. vs. The Westchester County Mutual Insurance Company*, 25 Wendell, 379; *Etna Fire Insurance*

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Company vs. Tyler, 16 Wendell, 385, 401; *Norton vs. Rensselaer & Saratoga Insurance Company*, 7 Cowen, 644, 648; *Patrick vs. Farmer's Insurance Company*, 43 N. H. 621; *Francis vs. Somerville Mutual Insurance Company*, 1 Dutch, 78; *Insurance Company of North America vs. Hope*, 58 Illinois, 75.

V. As to insurable interest. *Flanders on Fire Insurance*, 281; *Columbia Insurance Company vs. Lawrence*, 10 Peters, 507.

Wharton & Canfield, for defendant.

BLODGETT, J., charged the jury as follows: This is an action on a policy of insurance issued by the defendant, dated on the 20th of January, 1872, whereby defendant insured the plaintiff against loss by fire for the term of one year, for the sum of \$3,000, upon her two-story frame warehouse, size, 22x40 feet, with addition, 16x24 feet, used for shelling corn and elevating by horse-power, and for storing grain, situate on lot five in block four, in Galva, Illinois, and which policy at the expiration of the year was renewed and extended for the term of another year.

The property insured was destroyed by fire on or about the 20th day of March, 1873, while the policy by the terms of renewal remained in full force.

The defendant having refused to pay the loss, this suit is brought.

No question is made by the defendant as to the fact of the issue of the policy or its extension, nor is it denied that the property insured was destroyed by fire during the life of the policy. The defendant, however, denies its liability in this case upon the following grounds.

1st. That the property in question was insured for more than its value, and the policy thereby became void.

2nd. That the plaintiff was not at the time the said insurance was effected, nor at the time of said loss, the owner in fee of the lot on which the building in question stood, and

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the nature of the plaintiff's title to or interest in said lot was not expressed in writing in the policy.

3d. That plaintiff did not within apt time after the loss, render to defendant proper proofs of loss as required by the terms of the policy.

4th. Defendant insists that plaintiff was not at the time of the issuing of the said policy, nor at the time of the fire, the owner of the property insured, but that the same was in fact, owned by her husband Solomon Field.

5th. That even if defendant is liable at all to plaintiff on this policy, the value of the property is far less than is claimed by plaintiff.

I will consider the various points made by the defendant in their order.

That the policy is void because the plaintiff has caused the property to be insured for more than its value.

The policy contains a provision that "if the insured shall cause the property to be insured for more than its value, the policy shall be void."

The fair and legal meaning of this language is that if the insured shall intentionally obtain insurance on her property to an amount greater than its value, with a design thereby of obtaining, in case of loss, more than her property was fairly worth, she shall forfeit her policy.

It is a clause to prevent fraudulent over-valuation, and intended to deprive men of the benefit of such intentional over-valuation. But the clause does not render void a policy for such slight over-estimates of value as may be reasonably accounted for from difference of opinion as to value.

Value is always to a considerable extent a matter of opinion and judgment, and it would not be right to hold a policy void for over-valuation when it was clear from the proof that there was no intention to deceive, and when there was room for an honest difference of opinion. And this is especially true when the insurer, through its agent, has an equally good opportunity with the insured to ascertain the value of

the property, and when the value is a matter of discussion between the parties at the time the insurance is effected, and the agent is requested to personally examine the property, and act upon his own judgment as to its value. In such cases, unless some fraudulent concealment of material facts is shown, the over-valuation must appear from the proof to be very considerable and palpable, and to have been intentional, to avoid the policy under this clause.

In this case plaintiff has introduced proof tending to show that defendant's agent was requested to examine the property and place all the insurance upon it that it would bear; that the agent lived in the same town where the property was located, and had some personal knowledge of the property. If you believe this testimony, then you ought not to find this policy void for over-valuation, unless you are satisfied that the agent was in some way imposed upon and induced to issue the policy for the amount in question, by reason of something more than a mere error of judgment on the part of the plaintiff or her agent as to the value of the property. On this branch of the defense, the defendant has the laboring oar and must make out the charge of intentional over-valuation by a preponderance of evidence.

As to the second point insisted upon, the policy contains this clause, "If the property insured be held in trust or on commission, or by a leasehold or other interest not amounting to absolute or sole ownership, or if the building insured stands on leased ground, it must be so represented to the company and expressed in the policy in writing; otherwise the insurance will be void." The main object of this clause is to prevent parties from insuring property in which they have no insurable interest. It is admitted by the plaintiff in this case that she did not own the fee simple title to the lot on which the property insured stood, but that she did own the building, and moved it on the lot under a verbal arrangement with the owner, whereby she was to pay the taxes and have the privilege or option of buying the lot for \$400, whenever

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she saw fit to do so, and the owner was not to sell to any one else without notifying plaintiff and giving her the privilege of buying at the price stipulated. There is nothing in this policy to indicate that plaintiff's interest in the lot is less than a fee-simple title. The insurance is upon her two-story frame warehouse, situate on lot 5, block 4, etc. Upon the face of the policy it would appear that she claimed to be the owner of the lot as well as the building; that is, there being no expression to the contrary, such would be the legal inference from the language of the policy itself. The agent of the defendant, who wrote the policy, testified that when the application for the policy was made, the husband of plaintiff, who signed the application in her behalf, said, when asked about the title of the lot, that he had as good as bought it, while the evidence on the part of the plaintiff tends to show that when the application was made, a full and true statement of the facts in regard to the terms on which the warehouse had been moved upon the lot was made to defendant's agent, and he was referred to the owner of the lot for further information in regard to the matter. You will observe in this connection that no answer was written into the application in reply to the question as to the title. This application is filled up by defendant's local agent at Galva, but whether signed by plaintiff's husband in her behalf in blank and filled up afterwards by the agent, or whether filled as far as it now is before he signed it, is a matter upon which there is a conflict of evidence. If, however, you are satisfied from all the evidence in the case, that at the time the policy was issued the agent of defendant knew the actual condition of the title to the lot,—that is, knew that plaintiff was occupying the lot under a verbal contract with the owner for the occupation or purchase of the same at her option,—and failed or neglected to write into this application or policy such statements in regard to the title, then defendant cannot avoid this policy by reason of the failure to express in the policy the exact terms of plaintiff's interest in the lot. In other words, it is a question of

fact for you to determine from the evidence whether the agent of the defendant knew at the time he issued this policy to the plaintiff, that she did not own the fee-simple title to said lot; and if you find he did so know, then his failure to make a proper note of the fact in the policy does not render the policy void. It was the duty of the agent to have made this explanation as to the title if he knew the facts, and the company will not be allowed to take advantage of his neglect in that particular, if he had such information.

As to the third point of the defense, the policy requires that the assured shall give immediate notice of the loss, "and as soon thereafter as possible render a particular account and proof thereof, signed and sworn to by him," and a failure to do so forfeits all claim under the policy. The defendant claims that plaintiff has not complied with this condition.

Plaintiff claims, first, that she did in apt time—that is, on the 14th day of April, 1873—render the proofs of loss required; second, that defendant, by his own action, waived the rendering of the proofs of loss.

It is admitted that plaintiff did furnish to defendant, on the 14th day of April, 1873, a proof of loss duly sworn to, but defendant insists that it does not comply with the policy, because she does not state her interest in the property insured, nor does she state in detail the nature of her ownership of the property. It being admitted that plaintiff did submit to defendant what purported to be and was intended as a proof of loss, in compliance with this condition of the policy, it is a question of law whether such proof was sufficient, no question being raised at the time; and I instruct you that the proof rendered was a substantial compliance with the terms of the policy. True, it might have been more specific, but it stated substantially all that she was required to state. That is, it gave the full written portions of the policy and all the indorsements thereon. It stated there was no other insurance, which is admitted to be the fact; it stated the actual cash value of the property at the time immediately preceding

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the fire; it stated that the property belonged to the plaintiff, which, I think, was a substantial compliance with the requirement that she should state the ownership and interest of the assured. It also states the purposes for which the building was occupied and by whom, the date of the loss and amount, and how the fire originated if known.

But as there is testimony in the case tending to show a waiver of proof of loss, I shall also ask you to make a special finding upon this point as a question of fact.

The evidence on the part of the plaintiff, bearing on this point, tends to show that, a few days after the fire in question, Mr. Holden, who was a general agent and adjuster for defendant, went to Galva and had an interview with plaintiff and her husband; that after being fully informed in regard to the condition of plaintiff's title to the lot, he informed plaintiff or her husband that the company was not liable for said loss, by reason of the failure to truly state the title to the lot in the policy, and only offered to make some small payment by way of gratuity or to save a law-suit. If you are satisfied from the evidence that defendant by its agent, did refuse to pay said loss on the ground of the invalidity of the policy for the reason stated, such facts may be considered by you as tending to show a waiver of the proofs of loss; for it may be properly asked, Why should plaintiff be required to submit proofs as to the nature and extent of her loss, if defendant did not intend to pay or even examine such proofs, but placed its refusal to pay on entirely other grounds, which the proofs of loss called for by the policy could not remove or do away with?

As to the fourth point, whether the plaintiff was the owner of the warehouse at the time of the loss and at the time the policy was issued, you have heard all the proof. It is admitted that plaintiff was the wife of Solomon Field at the time this policy issued, and at the time of the loss. She claims to have purchased the property with her own means, and I take it there can be no doubt it was either hers or her

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husband's; at least defendant does not contend that it belonged to any one else. If the husband, by his dealing with defendant, had estopped himself from claiming the property, that is, if he had insured it as the plaintiff's, then, as between plaintiff and defendant, she had the right to assert the ownership and take the insurance. You have heard all the proof on this question of ownership, and can say whether the plaintiff has or has not shown an ownership of this property as against defendant. And, finally, as to the value of the property destroyed which was covered by the policy, it is for you to say under the proof what that value was. If you are satisfied from the evidence that the building and addition insured, with the machinery, excluding the fanning-mill, was of the value of \$3,000 at the time of the fire, then the plaintiff will be entitled to recover that amount with interest at six per cent., since the expiration of sixty days after proofs of loss were furnished or waived.

If it was worth less than that amount, then she will be entitled to recover what it is found by you to be worth under the proof, with interest.

The jury returned a verdict for plaintiff, fixing damages at \$3,000, and also found that proofs of loss had been waived by defendant.

If the insured, with intent to defraud, makes claim for a larger loss than he actually sustained, he forfeits his rights. *Huchberger vs. Home Ins. Co.*, Vol. 5 of this Series, 106; *Same vs. Merchants' Fire Ins. Co.*, 4 do., 285.

As to the agency of a solicitor, and forfeiture of policy and waiver, consult *Oahill vs. Andes Ins. Co.*, 5 do., 211 and notes thereto.

The Supreme Court of Illinois has recently held that an insurance solicitor is the agent of the insured, and not of the company. The *Lycoming Fire Ins. Co. vs. John O. Buben*, 8 Chicago Legal News, 150.—[Reporter.

In re Scammon.

In re J. YOUNG SCAMMON.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JUNE,
1874.

IN BANKRUPTCY.

PRACTICE AS TO NUMBER AND AMOUNT OF PETITIONING CREDITORS.

1. UNDER THE BANKRUPT ACT AS AMENDED JUNE 22, 1874.—Creditors' petition must show affirmatively that the requisite number of creditors join therein. Such allegation may, however, be made upon information and belief.

2. PENDING CASES.—In cases pending at the time of the passage of this amendment, the petitioning creditors must amend their petition, and insert the allegations as to number and amount of the petitioning creditors.

3. ALLEGATION JURISDICTIONAL.—In all cases the creditors must make this allegation before the debtor can be required to show cause, or even file a schedule of his creditors.

4. ARGUMENTUM AB INCONVENIENTE,—can not be considered by the bankruptcy court; a creditor wishing the benefits of the law must comply with all its requirements.

5. PETITION VERIFIED.—The amended petition must be sworn to in the same manner as an original petition.

6. On the call of the calendar, a pending petition will not be dismissed, absolutely, but leave to amend will be granted.

7. The allegation that the requisite number of creditors join in the petition, is not sufficient, even when admitted by the debtor; the court must be satisfied that such is the fact.

This was a petition in bankruptcy, filed by the United States Mortgage Company against Jonathan Young Scammon. On the signing of the amendment of June 22, 1874, the debtor moved to dismiss the petition on the ground that it contained no allegation as to the number and amount of petitioning creditors as required by the amended act.

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This motion coming up on the day for the call of the bankruptcy calendar, all attorneys interested were present, and this decision was made with reference to all cases pending in this district.

Walker, Dexter & Smith, for petitioning creditor.

Lyman Trumbull and Ayer & Kales, for respondent.

BLODGETT, J.—I must confess that the question raised is not entirely free from doubt in my own mind. But there are some provisions of the law that are sufficiently clear. The thirty-ninth section of the original bankrupt act of March 2, 1867, is substantially and practically repealed, and a new section enacted in place of it. The new section enumerates the acts which shall constitute acts of bankruptcy, and for which a party may be forced into involuntary or compulsory bankruptcy, and proceeds as follows:

“And, subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt on the petition of one or more of his creditors, who shall constitute one-fourth thereof, at least, in number, and the aggregate of whose debts provable under this act amounts to at least one-third of the debts so provable.”¹

Now this must be done on the petition of that number of creditors. It is manifest, then, that from the time this becomes a law no person can be adjudged a bankrupt unless the requisite number of creditors join in the petition, because it must be upon their petition; and it is very clear to me that the practice indicated by the whole tenor of the law in respect to cases hereafter commenced is, that the petition must affirmatively show that the requisite number of creditors in number and amount have united therein. I do not think, as

¹ § 5021, R. S., 1874.

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has been urged, that this allegation as to the number of creditors must necessarily be so positive that the party could be prosecuted for perjury upon it. It may be stated (and I shall so hold, until some higher court decides the contrary) upon the information and belief of petitioning creditors, that they do constitute one-fourth in number and one-third in amount of the aggregate creditors, because we all know that creditors are very liable to be misinformed by debtors as to the extent of their (the debtors') indebtedness. Cases occur almost daily in practice, in which debtors have represented to their creditors that they owed only a very small amount of debts, in which, when the facts came to be developed, their entire indebtedness largely exceeded the amount stated. Creditors, of course, in preparing petitions in the first instance, speak according to the light they possess at that time. I think, therefore, it will be a sufficient compliance with the provisions of the law that they state on their information and belief that they do constitute one-fourth in number and one-third in amount of the creditors of the debtor named.

Then the law provides that if the debtor wishes to traverse this allegation he can do so by a statement made in writing that the requisite number of creditors have not joined in the petition, whereupon the court shall require the debtor forthwith to file a schedule of his creditors with the court, which, of course, must be, so far as he is concerned, conclusive; and if the creditors succeed, within the time limited by the act, in obtaining the consent of the requisite number of the creditors mentioned in the schedule filed by the debtor himself, the proceedings can go on; otherwise the proceedings must lapse. It may be also found necessary in practice to adopt some rule by which the creditor may contest the truth of the schedule so filed by the debtor. So that I see no difficulty in administering the law under the amendment, in respect to cases commenced hereafter.

The only question that has given me trouble has been, how to apply the law to cases already pending, which have been

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commenced since the first of December last. Taking all the parts together, it appears to me that it has become necessary, since the passing of the amendatory act, that the creditors who wish to prosecute this class of cases should apply to the court for leave to amend their petitions, and join the requisite number of creditors in the prosecution of the cases. Otherwise we must hold as nugatory, and of no application, some part of the language of this section. After providing, in the way I have already read, that the person guilty of any of the several acts of bankruptcy enumerated, may be declared a bankrupt on the petition of the requisite number of creditors, the law then provides that, "in all cases commenced since the first day of December, 1873, and prior to the passage of this act, as well as those commenced hereafter, the court shall, if such allegation as to the number or amount of petitioning creditors be denied by the debtor by a statement in writing to that effect, require him to file in court forthwith a full list of his creditors, with their places of residence and the sums due them respectively, and shall ascertain, upon reasonable notice to the creditors, whether one-fourth in number and one-third in amount thereof, as aforesaid, have petitioned that the debtor be adjudged a bankrupt."¹ This clause applies as well to cases to be commenced as to cases commenced since the first of December, 1873; and, as was well remarked yesterday in the discussion of this case, it is contrary to all the analogies of pleading in other cases, that a party should be called upon to deny a statement which has not been made against him. The language of the law is: "If such allegation as to the number or amount of petitioning creditors be denied by the debtor." There must be an allegation somewhere, then. The creditors, before they can require the debtor to file a schedule of his debts, must allege, in substance, that one-fourth of the creditors in number and one-third in amount have joined

¹ § 5031.

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in the petition, or do unite in the petition, and in the request to have the debtor adjudicated a bankrupt. There must be some allegation of that kind before he can be called upon to deny it. And I can see no special hardship in this which the law may not properly impose. A creditor who has already filed a petition may as easily obtain the consent of the requisite number to prosecute as for a creditor who is about to commence proceedings to obtain such consent as a condition precedent. It seems to me that the jurisdictional fact on which the court has the right to proceed is that the requisite number of creditors have acceded to the continuance of proceedings. The court, indeed, loses jurisdiction over the case unless it is made to appear affirmatively by the petitioning creditors that the requisite number of creditors request and demand the adjudication of the debtor as a bankrupt. The allegation (as I stated at the outset) that the requisite number of creditors have joined in the petition makes a *prima facie* case, makes a case on which the court can grant a rule to show cause, and the debtor is allowed the privilege of coming forward and showing that the requisite number of creditors have not joined in the petition. But it also imposes on the debtor the obligation of disclosing the number of his creditors, their places of residence, the amounts of their debts, so that their assent can be obtained within a reasonable time.

Further, I derive much support in this view of the case from the clause of the act which reads: "And if it shall appear that such number and amount have not so petitioned, the court shall grant reasonable time, not exceeding, in cases heretofore commenced, twenty days, and in cases hereafter commenced, ten days, within which other creditors may join in such petition."¹

Here is a difference of ten days given in favor of creditors who have already initiated proceedings, in the time granted

¹ § 5021.

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within which to obtain the consent of the requisite number of creditors to the continuance of the proceedings. It seems to me that this clause was placed there on purpose to enable a creditor who had already instituted proceedings to take the initial step to amend his petition, and seek the co-operation of such a number of creditors as was necessary to retain the jurisdiction. It cannot be supposed from the whole language of the statute taken together, that Congress intended to legislate this class of cases out of court entirely. The court cannot put that construction on the law. The only question is; Did Congress intend that where a petition had been filed since the first of December, 1873, by a single creditor, representing perhaps not over \$250, he should be allowed to proceed and prosecute that case to a conclusion, unless the debtor himself should come in and object and file a statement of the names of his creditors, and amounts of their respective debts, together with their residences, so that the creditor could obtain their assent? Taken with the clauses I have read, I do not think that can be construed to be the intention of the act; but it seems to me that the debtor is entitled, first, to have an allegation placed upon the record, that the requisite number of creditors do desire an adjudication. He may then deny that allegation and show that the requisite number of creditors do not desire his adjudication in bankruptcy. And when he has made that statement, the petitioning creditor has the right to take twenty days in which to obtain the assent of the requisite number. The reason for making a distinction between the time allowed in cases already pending and in cases hereafter brought, is manifestly this: Where creditors bring a case after the passage of the law, they are supposed to act in the light of what has already transpired, and have some information upon the extent of the indebtedness of the debtor. They are supposed to have investigated, so far as opportunities would enable them, the financial condition of their debtor, and ascertained approximately the facts in the case. With respect to cases commenced before the

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amendment went into force, they are supposed not to have made such investigation. Therefore extra time is given them before they will be put out of court. Now the creditor, under the practice suggested, in cases which are pending, could come into court and ask leave to amend his petition in the respect I have indicated. On the request being granted and the amendment made, the debtor will have the privilege, as in cases hereafter brought, of denying that the requisite number of creditors have assented. Then he will be required to file his schedule. The argument of inconvenience is one which the court cannot consider. The bankrupt law is a stringent provision for taking a man's business from his own control, and placing it in the hands of the court or his creditors for the purpose of closing his affairs. If creditors wish to do this, they must do it on the terms of the bankrupt law. The only question is, from whom shall the objection first come, or by whom shall the allegation be first made that the requisite number of creditors have not joined in the petition for adjudication. Taking the whole scope of the act, it seems to me that in all petitions where adjudication has not already been passed, the allegation must come from the petitioning creditors, and it must be made to appear affirmatively that the requisite number do join in the petition.

Now, take section thirteen, which is an amendment of section forty of the original act. It reads as follows:

"And if, on the return day of the order to show cause as aforesaid, the court shall be satisfied that the requirement of § 5021 (sec. 39) of said act as to the number and amount of petitioning creditors has been complied with, or if, within the time provided for in § 5021 (sec. 39) of this act, creditors sufficient in number and amount shall sign such petition so as to make a total of one-fourth in number of the creditors and one-third the amount of provable debts against the bankrupt, as provided in said section, the court shall so adjudge, which judgment shall be final; otherwise it shall dismiss the proceedings, and, in cases hereafter commenced, with costs."

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Thus, it appears, it becomes a matter of inquiry for the court to ascertain and adjudicate upon, whether the requisite number of creditors have joined; and the reason of that is very obvious. By other provisions in this same amendment to the law, a bankrupt who is forced into bankruptcy under the compulsory clauses of the act, is discharged without reference to the amount of dividend which he pays, while a bankrupt who goes into voluntary bankruptcy must pay a dividend at the rate of thirty per cent. It is to guard against collusive proceedings on the compulsory side of the docket that this provision is made, and it is made the duty of the court to investigate and find whether the requisite number of creditors have joined in the proceedings, and whether the proceedings are in good faith. The naked allegation in the petition in regard to the number of creditors who join in the proceeding, although admitted by the debtor, does not seem to be enough, but the court must inquire into the facts and be satisfied that the requisite number of creditors have joined in the petition; and must also be satisfied that the admission of such fact, if admitted by the debtor, is made in good faith.

It is hardly necessary to say, then, that I shall hold in all pending cases that it will be necessary for the petitioning creditors to amend their petitions within a reasonable time, otherwise the cases will be dismissed.

That the petition should show affirmatively that the requisite number of creditors in number and amount have joined in the petition, and that this allegation may be upon information and belief, see also *In re Isaac Scull*, 10 B. R., 165; *Warren Savings Bank vs. Palmer*, 10 B. R., 239; and other cases in subsequent Nos. of the Bankruptcy Register. If the allegation in regard to the joining of the requisite proportion of the creditors in the petition is defective, it may be amended, *In re James A. McKibben*, 12 B. R., 97.

When creditors have once joined in the petition they cannot be allowed to withdraw, if any other petitioning creditor objects. *In re P. H. Heffron*, post p. 156.—[Reporter.

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JOHN W. KENNICOTT vs. BOARD OF SUPERVISORS OF WAYNE COUNTY.

CIRCUIT COURT.—SOUTHERN DISTRICT OF ILLINOIS.—JUNE, 1874.

IN EQUITY.

MUNICIPAL BONDS.

1. LETTERS BETWEEN THIRD PARTIES.—engaged in negotiating the bonds are not competent evidence to impeach them in the hands of parties claiming to be *bona fide* holders, unless they are shown to have had some connection with such letters.

2. BONDS GIVEN FOR GOODS.—The fact that bonds were received from the treasurer of the railroad company in payment of goods, is not of itself sufficient to bar the merchant from claiming as a *bona fide* holder, if the goods were of such a character as would be of value to the company in the construction or operation of the road.

3. CORRECTION OF MISTAKES.—Where a case has been to the Supreme Court, the Circuit Court, in passing upon a collateral branch of the case, will not admit that that court has made a mistake in regard to any facts which it has actually passed upon. The party moving to correct such mistake must go to the Supreme Court for relief.

4. PROOFS BEFORE MASTER.—Under an order requiring claimants upon bonds to appear before a master and prove their claims, a presentation of the bonds by an agent or attorney is sufficient, though the proofs were taken in another state, if no suspicion has been thrown upon the *bona fides* of the bonds.

5. BONA FIDE HOLDER—PRESUMPTION.—Upon the presentation of a negotiable bond the presumption of law is that the person presenting is a *bona fide* holder, and until evidence is introduced tending to negative that presumption, he is under no obligation of proving himself a *bona fide* holder.

These were exceptions to a Master's report, finding certain claimants to be *bona fide* holders of bonds issued by the Su-

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pervisors of Wayne county, Illinois, to the Mount Vernon Railroad Company, which bonds had been contested by the county, and had been declared valid by the United States Supreme Court. The opinion of that court, with a full history of the bonds, will be found in *Kennicott vs. The Supervisors*, 16 Wallace, 452.

S. A. Goodwin, W. B. Scates, Jno. A. McClelland and M. Rorke, for complainants.

Henry Cranford and M. Knapp, for defendants.

DRUMMOND, J.—We have not examined the printed record in this case as it appears filed in the Supreme Court. We have only examined the testimony taken since. Under the case as it stood in the Supreme Court, it was decided that the bonds were valid and that the mortgage which was given to secure them was a valid security; and the only question, therefore, now before us is whether the bonds and coupons presented by the various parties-complainant are held by them in good faith and for value received.

Upon an interlocutory decree the case was referred to the Master, and he was directed to inquire as to the amount of these claims and the parties who held them. A supplemental report was accordingly made by the Master. To this report no exceptions are filed. It was understood, however, that the objection might be afterwards taken that these parties were not *bona fide* holders.

There are some objections to the evidence, which, perhaps, the court ought to decide.

For example, as to the letters that were introduced between the parties, who formed, to a greater or less extent, "a ring," as it was called, by which the County of Wayne was defrauded of the proceeds of these bonds, or of the bonds themselves. None of these letters are written by any of the bond-holders; they are simply letters between the various persons who had some connection with the bonds, with their negotia-

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tion, their delivery or their transfer; but they are mere private letters which ought not to bind the bondholders, unless connection is shown between them and the letters themselves. I do not understand that anything of that kind is proved, and they become, therefore, as to them, *res inter alios acta*, and by which, of course, they should not be bound.

They are, therefore, entirely incompetent to affect any questions in this case.

There are only a few of the claims to which it is necessary to refer, to determine whether or not these bonds and coupons are in the hands of *bona fide* holders. We have come to the conclusion that all which have been presented are in such hands.

In relation to the claim of Ransome & Co., boot and shoe dealers, it is said that they sold goods and received bonds from Mr. Lewis in payment, Mr. Lewis being the treasurer of the railroad company. Now the mere fact that the goods were received for the bonds, while it may be a circumstance requiring explanation, is not, of itself, sufficient to prevent a party being a *bona fide* holder. Mr. Lewis was the treasurer of the company; the bonds were, or might have been, in his hands, for negotiation, transfer or sale. It may be that certain goods were as valuable for the construction of a railroad as money itself, for example, iron, or any of the materials which would go into the construction of the road. So any goods which could be transferred to, or used by, the operatives of the road, and which would be received by them in compensation for their services which they had or might render, would be just as valuable as money. The mere fact that goods were received, does not prevent the bonds being held in good faith and for value. There must be circumstances showing that the purchaser of the bonds knew that there was a corrupt or fraudulent motive on the part of the vendor, or person transferring the bonds, in order to make him a holder in bad faith. There is nothing of the kind shown here. On the contrary, it is shown that they were the holders in

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good faith and for value, but that they received them in payment for goods instead of money.

As to Mr. Myers' claim, the chief objection made to that grows out of facts contained in the original record, and upon which we think the Supreme Court has substantially passed, and with which we do not feel inclined to interfere. If the Supreme Court made a mistake in relation to the facts, it is only respectful for this court to require the parties to go to that court to have it rectified. The Supreme Court say in effect that, on the assumption that certain principles of law stated by that court were correct, there was no defense.

It is objected that this matter was referred by an interlocutory order to the Master, and that parties who were claimants upon these bonds were required to appear before him at his office in Springfield, on or before a certain day named, and prove their claims.

Under this interlocutory order notices were given to the opposite counsel and by publication, and proofs have been taken, under the acts of Congress, in New York, and presented before the Master in the form of depositions, and the objection is, that this is not a literal compliance with the order; that they ought all to have been taken personally before the Master.

These proofs related to the bonds themselves, which were the subject of controversy, and as to which the Supreme Court had decided that the security given by the county of Wayne was valid, and therefore all that need appear was that these parties, having these bonds or coupons, were the holders in good faith, and we think that they may be presented before the Master here, through their agents or attorneys upon proof thus taken, under the acts of Congress. It is true that the order might have been more general, and might have stated that proof in relation to the *bona fide* character of the holders might be taken elsewhere; but where the bonds are presented before the Master, and there is nothing to throw suspicion upon them, it is not material how they are presented. They

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are within the scope and spirit of the order. If they are presented by the claimants by their agents, or by their attorneys, and the fact is that proof has been taken on notice, or that petitions have been filed fortified by affidavit, we think it ought not to prevent the operation of the interlocutory order, and this independent of the seventy-seventh rule. They are in the largest sense presented before the Master in Springfield, though proof may have been taken in New York. Now in some of the cases the bonds are produced before the Master, the holders thereof stating that they are the holders in good faith. The presumption of law is that they are such holders. These bonds have all the characteristics of negotiable instruments. When a man presents himself before the Master with such a bond in his hand, it is a presumption of law that he is a *bona fide* holder. It was objected by counsel for the defendants that there was no proof as to the *bona fides* of these holders. If there had been any evidence introduced calculated to throw suspicion upon the bonds, then it might have been proper for the court to give the defendants an opportunity of introducing evidence upon that point; for instance, in relation to the bonds of Mr. Crooks, who presents them to the Master, who makes a supplemental report in relation to them. Now if there was any evidence calculated to throw suspicion upon these particular bonds, then the court might have required the claimants to supplement the evidence created by the holding and presentation of the bonds by some additional evidence. But that has not been done here. They were asked if they had any evidence on that subject, but none has been produced, and so we have to take it as a presumption of law, not met by anything to countervail it, that these parties are the holders of the bonds in good faith and for value.

These considerations, I think, dispose of all the questions in the case. We cannot lose sight of the fact that the substantial defense in the case has been considered by the Supreme Court and decided against the defendants; and that therefore

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the only question is an incidental question, growing out of the position of the bond-holders.

No doubt the county of Wayne has been much wronged in this case. Gross injustice, and it may be fraud, has been practiced upon the county by its own citizens and by its own officers; but unless these bond-holders can be connected with that fraud, by notice, or by some circumstance calculated to throw suspicion upon their possession of the bonds, it would be contrary to the first principles of equity and right that they should suffer for the wrong committed by the officers of Wayne county, or the Railroad Company, who had the disposal of the bonds.

It may perhaps be questioned whether municipal bonds should ever have been held to be valid, as affecting counties, towns and other similar public bodies, because so large a number of people and so large an amount of property should not be affected by a wrong or a fraud practiced by the individuals who have the sale and the transfer of such bonds. But that question has been foreclosed. It is not an open question now in the Federal Courts. It has been universally held that municipal authorities can make and issue bonds, provided there is a law justifying it, and that the officers employed and elected by them can negotiate them. Therefore these municipalities should be more careful as to the men they intrust with their funds. They should select honest men. If they do not they must stand by the consequences, just as a man must who employs an agent to do his business. If the agent commit a fraud, the person with whom he has transacted his business, and who has acted in good faith, cannot be permitted to suffer. The person who has employed him and held him up to the world as his agent must suffer. This principle has been applied to municipalities in cases like this. Therefore if it be true that the county of Wayne has been wronged in this transaction, it has been by its own agents, and it must suffer the consequences of the breach of trust committed by them.

It has occurred as a question to us whether we should di-

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rect the sale of this property without redemption. We have come to the conclusion, under the circumstances of the case, that we will not do so; that we will require the property to be sold in parcels not exceeding 160 acres, and authorize a redemption. We think this would be more just to the county, and more just also to parties who may be holders under a subsequent incumbrance, of the whole or any part of this property, and it will tend to produce a larger sum of money for the benefit of the creditors than a sale in quantity. If the plaintiffs become the purchasers, they may thus be obliged to give something near the value of the land, in order to avail themselves of the security they have.

A decree will be prepared in accordance with these principles.

In re Scammon.

*In re J. YOUNG SCAMMON.*DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY,
1874.

IN BANKRUPTCY.

PETITION BY SINGLE CREDITOR.—Since the amendment of June 22, 1874, a petition by a single creditor will not be sustained, if it appear that he did not have good reason to believe that he constituted the requisite proportion of the creditors; and upon this question affidavits and depositions may be taken, and the debtor should not be required to file a schedule of his creditors, and the petition may be dismissed on motion.

Wirt Dexter, for petitioning creditor.

Lyman Trumbull and *B. F. Ayer* for respondent.

BLODGETT, J.—On the 12th day of May, 1874, the United States Mortgage Company filed its petition in bankruptcy, alleging that it was a creditor of J. Young Scammon to the amount of \$150,089, as evidenced by a judgment rendered in its favor in the Circuit Court of Cook county, and alleging that said Scammon had been guilty of certain acts of bankruptcy, and praying that he might for said acts be adjudged a bankrupt.

After the passage of the act of June 22, 1874, amendatory of the bankrupt law, a motion was made by respondent to dismiss the proceedings, for the reason that it did not appear that one-fourth of his creditors in number, and the aggregate of whose debts amounted to one-third of the debts provable against his estate in bankruptcy, had joined in the petition.¹ The petitioner thereupon took leave to amend, and after-

¹ See *ante* p. 130.

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ward amended its petition by alleging that it was "informed and believed that it constituted one-fourth in number, and that the debt due it from the bankrupt constituted one-third of the amount of debts provable in bankruptcy against the respondent." The original and amended petitions are both verified by Alfred W. Sansome, as the agent and attorney in fact of the petitioner—the petitioner being a non-resident corporation. The respondent thereupon filed his affidavit, setting forth in substance that the petitioner did not constitute one-fourth of his creditors who would be entitled to prove their debts against his estate if he should be adjudged bankrupt, and that said Sansome, the petitioner's agent, well knew that he, Scammon, owed a much greater number than four persons who would be entitled to prove their debts against him in bankruptcy, and alleging that the amendment to the petition was not made in good faith, but solely for the purpose of vexing and harassing the respondent; and upon the statement in said affidavit respondent based a motion to dismiss said proceedings, on the ground that they were not instituted and prosecuted in good faith by the requisite number of his creditors.

This motion has been argued and submitted, both upon the question of fact as to Mr. Sansome's knowledge at the time this amended petition was filed as to the number of Mr. Scammon's creditors, and upon the law raised by said fact, if established. Depositions and proofs have been submitted *pro* and *con*, and I think the fact is clearly proven that Mr. Sansome did know, or at least have good reason to believe, at the time he filed and verified the amended petition, that the petitioner did not constitute one-fourth in number of Mr. Scammon's creditors who would be entitled to join in or prosecute proceedings against him in bankruptcy.

This fact being assumed to be proven, the question is: Should the proceedings be dismissed because not prosecuted in good faith?

As the law now stands, a debtor guilty of any of the acts of

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bankruptcy mentioned in the law "shall be adjudged a bankrupt on the petition of one or more of his creditors, who shall constitute one-fourth thereof, at least, in number, and the aggregate of whose debts provable under this act amounts to at least one-third of the debts so provable."

As creditors cannot be presumed to know positively the condition of a debtor's affairs, nor the exact number of his creditors, it has been deemed a sufficient compliance with the law if the petition alleged in the first instance upon information and belief that those joining in it constituted the requisite number to commence proceedings. Such an allegation may, however, be met by a denial on the part of the debtor that the requisite number have joined in the petition, but in that case the debtor may be required to file a full list of his creditors, with their places of residence and the amounts due them respectively, and other creditors may have time in which to join in the petition. Here, however, the debtor insists that inasmuch as only one creditor, and that not constituting the requisite number, has presented this petition, and as it is made affirmatively to appear that the petitioning creditor knew through its proper agent that a sufficient number of creditors had not joined in the petition, the petitioner has no standing in court, and the proceeding can be dismissed on motion, without filing a list of creditors.

It is conceded on the part of the petitioner that these proceedings cannot go on unless it shall be made to appear that the requisite number of creditors either now are or shall hereafter become parties thereto; but it is contended that the debtor should come in and file a list of his creditors, with their residences, and the amount due to each, so that the petitioner may know who they are, and obtain, or attempt to obtain, their co-operation in this proceeding.

As I have already said, when creditors acting in good faith

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aver that they constitute the requisite number to proceed in bankruptcy, I think the debtor is put upon answer and is obliged to furnish them the facts in regard to the number of his creditors and amount of his debts, if he claims that the requisite number have not united in the proceeding, but this is on the assumption that those filing the petition are proceeding in good faith. There can, however, be no doubt that it is essential to the jurisdiction of the court that the requisite number of creditors shall, in some form, unite in the petition to have a debtor adjudged a bankrupt, and nothing less than that number, on a *prima facie* case, have the right to invoke the aid of the court. The evident intention of the law is to leave it for the requisite quorum of a man's creditors to say whether they will put him in bankruptcy or not. One creditor alone, unless he is one-fourth in number of all a debtor's creditors, cannot prosecute bankruptcy proceedings, nor would it seem consistent with the spirit of the bankrupt law that any number less than one-fourth of a man's creditors, or those honestly believing themselves to be so, can call upon their debtor under the guise of bankruptcy proceedings to give them a list of his creditors.

It may be said that a debtor is under obligation to state his affairs in full to his creditors at any and all times, and that they are, from this relation to him, entitled to the truth. And this may be conceded as a matter of moral obligation, but when creditors invoke the stringent remedy of the bankrupt law they must do it by strict compliance with its provisions. They can have the information through the means of the bankrupt law only by complying with its terms. Here we have a single creditor, acting through an agent, appealing to the bankrupt law, and it appears that at the time he filed his amended petition he knew that the debtor owed a large number of other persons, and that his principal alone did not constitute one-fourth of the creditors of the debtor. Upon this state of facts he had no right to call upon the court to put the debtor in bankruptcy. His standing was certainly no better

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when he filed his amended petition than it would be now if the debtor were to file his list, and no one of the other creditors, or not enough of them, join him.

What under certain circumstances creditors might find out by the filing of the list, under a rule of this court, this creditor knew before he proceeded with the amended petition.

And notwithstanding these proceedings have now been many weeks before the court, none of the creditors of this debtor, except this single petitioner, have asked to be made a party to this petition. I think, therefore, that the fair presumption must be that the requisite number of creditors do not wish to prosecute bankruptcy proceedings, and this proceeding, having been commenced by a single creditor, with knowledge that it alone could not maintain it, the proceeding should be dismissed.

An order will therefore be entered to that effect.

The absence of the allegation as to number and amount of petitioning creditors in a petition filed by a single creditor is not supplied by the admission of the debtor, even if made in writing, unless the court is satisfied that the admission is made in good faith. *In re Keeler*, 10 Bankruptcy Register, 419.—[Reporter.]

In re Raffauf.

*In re JACOB RAFFAUF.*DISTRICT COURT.—WESTERN DISTRICT OF WISCONSIN.—JULY,
1874.

IN BANKRUPTCY.

1. The amendment of June 22, 1874, respecting the number and amount of petitioning creditors, has no application to cases in which an adjudication had been entered.

2. CONCLUSIVENESS OF ADJUDICATION.—The adjudication is a decree of the court, and is beyond legislative control.

The bankrupt filed an affidavit showing that the requisite number of his creditors did not petition for his adjudication according to the 12th section of the act of June 22, 1874, amendatory of the bankrupt law, and moved that the proceedings be dismissed unless a sufficient number join in the petition within the time prescribed in said act.

The petition was filed against the bankrupt in this case on the 5th day of February, 1874, and an order was made requiring him to show cause on the 16th day of February, why he should not be adjudged a bankrupt, which was duly served upon him, and, on the return day he was adjudged a bankrupt by default, and a warrant was issued to the messenger in due form, upon which his property was seized, and his creditors were notified of the first meeting before the register to elect an assignee, and on the day fixed an assignee was duly chosen by the creditors, who then and there accepted and qualified, and proceeded in the execution of his trust under the assignment. He was pursuing his duties as such assignee when the amendatory act above mentioned was passed.

E. E. Bryant, for bankrupt.

In re Raffauf.

D. K. Tenney, for creditors.

HOPKINS, J.—The question raised by this motion is, whether the amended act applies to cases in the advanced condition this was when the act took effect. The twelfth section of the amended act requires that the petitioning creditors must constitute and consist of at least one-fourth of the number of the creditors, and represent at least one-third of the aggregate amount of the debts of the alleged bankrupt; and declares that those provisions shall apply to all compulsory or involuntary cases commenced since December 1, 1873. It provides, also, that if the allegation as to number or amount is denied by the debtor, the court shall, in the mode prescribed, ascertain whether the requisite number and amount have petitioned, and if not, then the proceedings should be dismissed,—from which it is manifest that in cases hereafter commenced, an allegation to that effect will be necessary or a satisfactory excuse presented for its omission.

These provisions of the act the bankrupt seeks to have applied to this case; but I do not think they apply, for the reason that the adjudication in this case had been made before the passage of the amended act. The adjudication is the judgment of the court, a decree of bankruptcy, and it is very questionable whether it could be vacated or overreached by the legislative department of the government. That department might as well set aside the judgments of the courts in other cases, as to avoid this, and I do not assent to the existence of such power in Congress over the judgments of courts. But it is not necessary to rest my decision wholly upon this ground, for I do not think a proper and reasonable construction of the act authorizes such an application of its provisions. Its requirements are satisfied with an application of its provisions to existing cases before adjudication, and such seems to me to be the obvious meaning of the amendment. The construction contended for here would make great confusion, as in many cases assignees have converted the property into money and paid

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officers' fees and expenses out of it; and in some instances may have paid dividends. It would be impossible, in all cases, to place the parties in *statu quo*, and I cannot believe that Congress intended to unsettle the transactions of assignees, as such a construction would. It would occasion great and irreparable loss to many estates in the process of settlement in the hands of assignees. But I think there is still another answer. In most cases, as in this, probably, a greater proportion of the creditors, in both number and amount, than the amended act requires, have proved their claims against the bankrupt's estate, and thus became voluntarily parties to the proceedings, which may be considered, on an application of this character, and at this stage of the proceedings, as equivalent to a joining in the petition and consent to the bankruptcy. Having voluntarily become parties by proving their debts, they would be estopped, without withdrawing their proof, from objecting to the regularity of the proceedings, and no reason is perceived why the debtor should be heard to demand a more formal participation or assent on their part. The object of the amendment was doubtless to protect debtors from being proceeded against by a persistent creditor without the approval of any others, perhaps against the wishes and interests of all the other creditors as well as the bankrupt himself; but when it appears, as it does, that nearly all the creditors have proved their debts, and thus become parties, voluntarily, to the proceedings, there is no reason, in the opinion of this court, for requiring a certain number to join as petitioners. Judge Blodgett, in considering the effect of this amendment, in *In re Scammon*, ante p. 145, decided that the act applied to existing cases; but that was in a case where there had been no adjudication before the passage of the law, and although his language is general, it must be understood to have been used in reference to the facts of the case under consideration, and as not covering cases like this, where an adjudication and appointment of assignee had been made. If he meant to include such a case as this, I should feel constrained to dissent from his conclusions;

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but there is nothing in his opinion to indicate that he intended to embrace cases already adjudicated, and it does not, therefore, involve the question now under consideration.

My conclusions upon the case here presented, are, that it is not necessary to amend the petition when there has been an adjudication before the amended act took effect; that the provisions of the amended act, in regard to the number and amount of the petitioning creditors, do not apply to such cases; but, on the contrary, I hold that the judgment of adjudication, based upon a petition conforming to the provisions of the law in force when made, is valid, and as binding upon the debtor and his creditors as if the amended act had not been passed; that the adjudication removed the case beyond the domain of legislative control.

The motion of the bankrupt is denied.

That this amendment does not affect cases in which adjudication had been entered, consult also. *In re Pickering*, 10 Bankruptcy Register, 208; *In re Frederick E. Angell*, Id. 73; *In re H. & M. Rosenthal*, Id. 191; *Obear vs. Thomas*, Id. 151; *In re O. B. Comstock & Co.*, Id. 451; *Barnert vs. Hightower*, Id. 157; and several other cases, in subsequent Nos. of Bankruptcy Register.—[Reporter.

In re Christley.

*In re WILLIAM C. CHRISTLEY.*DISTRICT COURT.—SOUTHERN DISTRICT OF ILLINOIS.—JULY,
1874.

An attorney cannot act for a creditor at meetings held in the course of proceedings in bankruptcy, unless authorized to do so by a letter of attorney acknowledged before a Register in Bankruptcy or United States Commissioner.

E. M. Tracewell, for M. M. Kendall and others, creditors.

Woodbury, Peckinpugh & Zenor, for objecting creditors.

At the first meeting of the creditors in the above entitled matter, Edward M. Tracewell, Esq., appeared and filed proofs of debt by Marcus M. Kendall and other creditors, and at the same time presented letters of attorney, purporting to have been executed by said creditors for the purpose of authorizing him to act for them in the proceedings herein, the execution of which said letters of attorney had been acknowledged in one instance before a notary public, and in other instances before the clerk of the Crawford Circuit Court, in the state of Indiana. The register presiding at said meeting declined to receive or recognize the said letters of attorney, or to permit said Tracewell to cast the vote of said creditors in the election of an assignee, as he desired and offered to do; and at his request, the question then arising was certified into court by said register, with the reasons for his action set forth in the following opinion, for the decision of the judge.

Opinion of the Register. — The bankrupt law provides (section 23) that "Any creditor may act at all meetings by his duly constituted attorney the same as though personally present." Neither the law as originally enacted, nor any of the amendments thereto, prescribe the manner in which an

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attorney may be "duly constituted." The justices of the United States Supreme Court, under the authority conferred upon them by the 10th section of the law, authorized the appointment of attorneys by special and general letters of attorney. (Forms, Nos. 14 and 26.) No form of acknowledging the execution of either of these is given, but in a note at the close of the latter form it is stated that the creditor "may acknowledge the same before a Judge, Register, Clerk or Commissioner of the Court, or any officer authorized to take acknowledgments of Deeds or other Instruments in Writing." Subsequently the justices of the Supreme Court in their revision of the general orders in bankruptcy designated Registers in Bankruptcy and United States commissioners, as the only officers before whom such acknowledgments may be taken.¹ The recent amendment to the bankrupt law, which authorizes notaries-public to take proofs of debt in bankruptcy cases, does not change the requirements of General Order No. 34, as to letters of attorney, but is wholly silent concerning them. The execution of the letters of attorney, presented by Mr. Tracewell, having been acknowledged before neither one of the officers named in said General Order No. 34, I do not think that the person to whom they are addressed can be regarded as the "duly constituted attorney," within the meaning of the bankrupt law, of the creditors who subscribed the same; or that he can be permitted to act for them in the selection of an assignee or otherwise in the proceedings herein.

Respectfully submitted,

NOBLE C. BUTLER,

Register in Bankruptcy.

TREAT, J.—The decision of the Register is in all things affirmed.

Proofs of debt taken before a Notary Public, who is the attorney for the creditor are not admissible. *In re Henry Nebe*, 11 B. R., 289.—[Reporter.

¹ See General Order No. 34.

In re Heffron.

In re P. H. HEFFRON.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY,
1874.

IN BANKRUPTCY.

WITHDRAWAL BY CREDITORS FROM BANKRUPTCY PROCEEDINGS.

1. Creditors who, since the amendment of June 22d, 1874, have joined in the petition cannot afterwards be allowed to withdraw from the proceedings.

2. Such a practice would lead to underhand agreements between the debtor and a part of his creditors at the expense of the others, and cannot be allowed.

3. *Semble*.—If all desire to dismiss the proceedings it could be done.

Bonfield & Swezey, for creditors.

Eldridge & Tourtellotte, for debtor.

BLONKETT, J.—The original petition in this case was filed before the passage of the amendment of June 22, 1874, to the general bankrupt law. After the amendment had been passed, the debtor alleged that a fourth in number of his creditors, representing a third of the debts provable against him in bankruptcy, had not joined in said petition, and filed a list of his creditors. Thereupon time was given for the requisite number of his creditors to join said petition, and an amended petition was subsequently filed by the requisite number of creditors. Now, a portion of the creditors who have joined in said petition come into court and ask leave to withdraw their names from said petition, and that said petition and proceedings be dismissed so far as they are concerned, thereby leaving less than the requisite number of parties to said petition.

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After careful consideration of the matter, I am of opinion that this request should be denied, and that none of the creditors who have joined in the petition should be allowed to withdraw unless all do so. Of course if all the creditors of a debtor express a desire to dismiss the proceedings, they should, as a rule, be allowed to do so. But as the bankrupt law now stands, I am satisfied it would be a mischievous practice to inaugurate, to allow a quorum to be broken after they have united in good faith for the prosecution of the proceedings. It would lead to underhand and secret negotiations between the debtor and a portion of the creditors, and be a strong incentive for showing favors to a few creditors at the expense of the many.

It may be said that the same influence may be brought to bear upon those holding the balance of power before bankrupt proceedings are commenced, but my answer to that is, that the court has naught to do with the parties until they commence proceedings, and then should not allow those who do commence proceedings to break faith with their associates, and desert the standard they have united to raise.

I do not intend to say that creditors who have been misled by false representations should be prevented from withdrawing on discovery of the truth, if the court is satisfied that they were so misled; but in this case there is no such suggestion, and all the surrounding circumstances tend to show that the creditors who wish to withdraw have been wrought upon by the debtor.

Leave to withdraw denied.

A creditor who has in good faith joined in an involuntary petition cannot withdraw, nor can he afterwards object to an amendment thereof, which is necessary to the prosecution of the same to final effect; but a creditor who was induced to join by misrepresentation may be allowed to retire at any time before adjudication. *In re Sargent*, 18 Bankruptcy Register, 144.—[Reporter.]

A. & P. Telegraph Co. vs. C., R. I. & P. R. R. Co.

THE ATLANTIC & PACIFIC TELEGRAPH CO. vs. THE
CHICAGO, ROCK ISLAND & PACIFIC R. R. CO.

CIRCUIT COURT. — NORTHERN DISTRICT OF ILLINOIS. — JULY,
1874.

IN EQUITY.

1. RIGHTS OF TELEGRAPH COMPANY ON RAILROAD RIGHT OF WAY.—Neither the acts of Congress declaring railroads to be post-roads, nor the act of July 24, 1866, providing that telegraph companies may construct their lines over post-roads, authorize a telegraph company to establish its lines over the right of way of a railroad company without making compensation therefor according to law.

2. CONSTITUTIONAL LAW.—It is beyond the power of Congress to authorize a telegraph company to construct its line over private property without making compensation.

Bill for an injunction, setting forth that the defendant would not permit the entrance of complainant's engineers and workmen upon its right of way, for the purpose of establishing thereon a telegraph line according to its charter, and asking that defendant, its agents, etc., might be restrained from interfering with the construction of such line.

Dent & Black, for complainant.

Williams & Thompson, for defendant.

DRUMMOND, J.—The only controversy here is as to so much of defendant's railroad as lies within this state.

The plaintiff claims to be a corporation organized under the laws of New York for the purpose of constructing a telegraph line between the cities of New York and San Francisco; and that, in order to carry out that purpose, it is necessary to construct such line upon the right of way of defendant, be-

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tween Chicago and Omaha, including that part of defendant's road lying within this state.

The authority to do this is claimed to exist under various acts of Congress, some of which declare all railroads in the United States to be post-routes.

By these acts I understand nothing more is meant than that the mails can be transported over railroads, as over ordinary public highways, with all those securities and safeguards thrown around the transit of the mails by various congressional enactments. It does not necessarily follow that because railroads are thus declared post-routes, the United States can, therefore, without the consent of the railroad companies, and without compensation, transport the mails over them.

An act of Congress of July 24, 1866, provides that any telegraph company then organized, or which should thereafter be organized, under the laws of any state, should have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, and over and along any of the military or post-roads of the United States, which had been or might thereafter be declared such by acts of Congress.¹

There can be no doubt of the plenary authority of Congress over the public lands or military roads of the United States. It is also competent for Congress, as it has frequently done, to make grants of public lands to railroads, upon such conditions as it may choose to annex thereto.

The main controversy in this case turns upon the true construction of this act of Congress. The bill avers that the defendant has a right of way over which its railroad is constructed. There is nothing to show that this right of way was granted through the public lands by act of Congress; on the contrary, the fair inference is, that the defendant acquired it, either by direct purchase from the owners of the land, or

¹ U. S. Revised Statutes, 1873-4, p. 1024.

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by condemnation of the land for the uses of the railroad in accordance with the laws of the state. In either case the railroad would own the property for its own special purposes, having paid for it either by express contract with the owners, or in accordance with the method provided by law.

It is true that a railroad has certain public uses, and is, for certain purposes, subject to the control of the state; and in consequence of these public uses the law authorizes the condemnation of private property; but still, when the property has thus been acquired, it becomes private property, notwithstanding the railroad has public uses; that is to say, the property can be used for the benefit of the shareholders of the company. The right of way can be so used, just as much as the road-bed itself, the ties, the rails, the locomotives or the cars; they are all to be used for the benefit of the shareholders, although such uses may be of a public character, and the public may have a certain limited control over them.

The right to construct a telegraph line implies the possession, control, and use of real property, and, in this case, of the possession, control and use of a portion of the right of way of the defendant.

The question here is, whether Congress intended that in such a case as is now before the court, any telegraph company could, without compensation to the railroad company, exercise these rights of possession and ownership.

I think that such cannot be considered the true construction of this act of Congress.

The act provided that telegraph companies might have the right to take and use from the public lands of the United States stone, timber and other materials for its posts, piers and stations, in the construction, maintenance and operation of lines of telegraph.

There could be no objection to such a grant, as applicable to the public lands of the United States, but there seem to be insuperable objections to such a construction of the act as would authorize the taking and using by telegraph lines of

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land owned by railroad companies, and of which they seem to have the exclusive control for their own purposes.

Such a construction will not be placed upon the act unless its language is inconsistent with any other meaning. And I do not think the true construction of it is, that it intended to authorize any telegraph company to work on the roadway of a railroad, or upon a post-road of a railroad of which it, and not the public, was the owner.

The rights of a railroad over its roadway are different from those which belong to the public at large in regard to the ordinary highways and roads of the country. Over the latter any person can travel; there is an absolute right of user in the public.

In the case of public turnpikes and bridges, this right sometimes exists subject to the claim of the proprietors to exact a certain compensation for the privilege of passing over them, but the right to pass is absolute, subject to the payment of the requisite toll. Such rights do not exist on the part of the public in railroads, or in the right of way of railroads.

It could not be claimed that after a railroad company had purchased its land, constructed its road-bed, laid down its ties and iron, and placed upon the road its locomotives and cars, an act of the legislature of a state, or an act of Congress, could authorize any other railroad company to pass its cars or locomotives over such railroad without compensation and without permission, unless, indeed, such right was reserved in the charter, or the grant was made subject to the same. The railroad itself, alone, has the right to pass its own cars and engines over its roadway, and to use it for the profit of its shareholders.

The right to construct a telegraph line would imply the right to construct another railroad, or to add indefinitely to the number of telegraph lines that might be placed over the right of way.

The right of the telegraph company to construct its line

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over the right of way of the defendant, is a right inconsistent, in many respects, with that absolute right which the defendant possesses over its own road-bed and right of way.

For example: the railroad has a right to take gravel and dirt throughout the whole extent of its right of way, or to use that right of way for the purpose of laying down additional tracks or side-tracks.

But the right to construct a telegraph line thereon necessarily interferes with the absolute right of the railroad to its right of way. That is a right which cannot be taken without compensation. It is a right of property existing in the railroad company, which no person or other company can take from it without its consent, or without paying for it.

In view of these considerations, it is, I think, clear that this act of Congress did not intend to confer on the plaintiff any such right as is contended for. And, granting that such was the intention, it is beyond the authority of Congress to deprive the defendant of its rights of property without providing compensation, because the construction of the telegraph line involves necessarily the actual taking of the property.

I am of opinion that plaintiff's claim is not maintainable in point of law; and that it has no right to establish a telegraph line upon defendant's right of way without making compensation therefor in accordance with law.

It is urged that the state statute authorizing the condemnation of private property for the use of a telegraph line only refers to companies existing under the laws of the state, and is not applicable to this company, a corporation created by the law of New York.

If this be so, it furnishes no reason why the plaintiff should take the property of any corporation in this state without paying for it. It is one of those cases, omitted in the law, but because of that omission the plaintiff is not clothed with any additional rights.

The motion for an injunction is overruled, and the bill dismissed.

MARTIN A. HOWELL vs. THE HARTFORD FIRE INSURANCE COMPANY.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY, 1874.

COMPARISON OF HANDWRITING.—A party has no right to an instruction to the jury, allowing them to take to the jury-room a letter, the genuineness of which is denied, for the purpose of comparing it with a genuine letter; such comparison is only permissible during the progress of the trial.

E. A. Storrs, for plaintiff.

Wirt Dexter, for defendant.

BLODGETT, J.—This is a motion for a new trial, in which the plaintiff alleges several errors committed by the court in the progress of the trial of the case, as grounds why he should have a new trial. I have examined these grounds very carefully, and without going elaborately into a discussion of the points made by the learned counsel, and the very ingenious and able arguments which have been filed in the case, I must say, as I was impressed at the time of the previous arguments in the case, that the point is not well taken. The main point relied on is this: After the court had read its charge to the jury, the charge being in writing, Mr. Storrs asked the court to charge the jury that they might take the Shaw letter, which was in the case legitimately for other purposes and as general evidence, and compare it with the Foster letter, the genuineness of which is denied by the plaintiff, and draw their own conclusions as to whether the Foster letter was genuine by comparing it with the Shaw letter, and by comparing the form-

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ation of the letters, the spaces between the lines, and the general contour of the letters. The court refused to give this charge in these words to the jury, and stated that it did not think a comparison of the handwriting was allowable. The authorities cited, and which were not in my mind at the time, undoubtedly go to sustain the proposition that a comparison of handwriting may be allowed for the purpose of determining the genuineness or want of genuineness of a paper put into a case, where one of the papers is confessedly in the handwriting of the party. I think the distinction to be made here is, that the court was not asked to adopt this comparison upon the trial of the case, but was asked to instruct the jury that they might make that comparison in the jury-room in secret on their retirement, without having been asked to make the examination and comparison before the court during the progress of the trial. Now the authorities clearly go to show that if upon the progress of the trial the plaintiff had insisted that the jury should have the privilege of comparing the Shaw and Foster letters together and determining their genuineness, they should both be passed to the jury, and they should have the privilege of examining them. I think that was the proper time for examining them, for this reason: that the counsel and court would have had the privilege of pointing out a resemblance or want of resemblance in the two writings, and calling the attention of the jury to such facts in regard to the writings as bore upon the question of the genuineness or want of genuineness of the paper in question. That the jury should blindly be told to take this paper, and that the court should lay down the rule by which they should determine whether the Foster letter was or was not genuine, by the general arrangement of the characters and so forth, was asking for a comparison of handwriting to be made at an improper time, and asking the court to lay down the rule by which the comparison should be made, and the genuineness tested. The court holds, therefore, that there was no error committed by the court in refusing to charge the jury as asked, and that,

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therefore, no new trial can be granted. With regard to the other errors assigned, the court does not think that any of them were well taken.

The motion for a new trial is, therefore, refused.

It is competent for the court and jury to compare the handwriting of a disputed document, with any others which are admitted or proved to be in the handwriting of the supposed writer. *Griffith vs. Williams*, 1 Crompton & Jervis, 47; *Perry vs. Newton*, 5 Adolphus & Ellis, 514; *Rex vs. Morgan*, 1 Moody & Robinson 184, note; *Allport vs. Meek*, 4 Carrington & Payne, 267; *Bromage vs. Rice*, 7 Carrington & Payne, 548; Best on Evidence, § 289, note, and cases cited. A jury may judge of disputed handwriting by comparing it with other documents in for other purposes and admitted to be in the handwriting of the other party. *Solita vs. Yarrow*, 1 Moody & Robinson, 183. See also Saunders' Pleading and Evidence, volume 2, part 1, page 160.—[Reporter.

In re Steinman.

In re LOUIS E. STEINMAN.DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY,
1874.

IN BANKRUPTCY.

Since the amendment to the bankrupt act of June 22, 1874, a statement of his creditors filed by the debtor on denial of bankruptcy must be verified.

This was a creditor's petition filed previous to the passage of the amendment of June 22, 1874, and amended immediately thereafter by adding new petitioning creditors and inserting the required allegations as to the number and amount of creditors.

Adolph Moses, for the debtor, on the return day of the rule to show cause to the amended petition, presented a denial that the requisite number of creditors had joined in the petition, with a list of creditors annexed. The denial was not verified.

J. H. Bissell, for petitioning creditors.

BLODGETT, J.—Although the law does not expressly require that the list of creditors presented by the debtor, in denial that the requisite number and amount have joined in the petition, should be sworn to by him, the general intent of the act would seem to indicate that it should be done. Where the petitioning creditors have made out a *prima facie* case, if the debtor wishes to deny it, he should do so under oath, as the list of his creditors must be particularly within his own knowledge, and the petitioners are entitled to the benefit of a sworn list, that they may have some assurance that fictitious claims are not inserted.

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The practice in this district will be uniformly to require the list of creditors filed by the debtor to be properly verified.

The amendment of June 22d, 1874, does not require the denial of the debtor, that the petitioners constitute the requisite proportion of his creditors, to be sworn to, but in the absence of a rule of the Supreme Court on the point, it is proper to require such denial to be verified by the oath of the debtor, and for like reasons the list of his creditors filed by the debtor should be verified in like manner. *In re Jacob Hymes*, 10 B. R., 433.—[Reporter.

R. S. HAMLIN, ASSIGNEE, ETC., vs. W. C. PETTIBONE *et al.*

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—JULY,
1874.

1. **ERROR IN CHARGE.**—Where error in a charge relates to a matter which might have been corrected on the spot, if the attention of the court had been called to it, the party failing so to do cannot take advantage of the error on motion for new trial.

2. The amendment of June 22, 1874, to the Bankrupt Act does not affect cases commenced before Dec. 1, 1873, nor does the repealing clause affect suits by assignees then pending. The amendments are not inconsistent with the original act, except as to cases commenced since Dec. 1, 1873.

3. **REPEALS BY IMPLICATION, OR BY GENERAL CLAUSE**—are never favored, and are never extended beyond their necessary operation.

4. **TIME—VESTED RIGHTS.**—In cases where no other time is mentioned the amendment only applies to cases arising after its passage. Congress did not intend to validate contracts void under the original act, or to affect contracts theretofore made, or the substantial rights of parties acquired under the original law.

5. The substitution of "knowing," for "having good reason to believe" is merely a verbal one, inapplicable to most cases. Notice of facts suffi-

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cient to put a person upon inquiry amounts in law to knowledge of the facts which inquiry would have developed.

Motion for new trial after judgment for plaintiff. The facts appear in the opinion.

Jackson & Felker, for plaintiff.

Luther S. Dixon, for defendants.

HOPKINS, J.—This action was commenced before the passage of the amendments to the bankrupt law, of June 22, 1874, and the proceedings in bankruptcy were instituted long before the 1st day of December, A. D. 1873; and the sale sought to be set aside and avoided by the assignee in this case, as fraudulent, was made long before that time.

The case was tried and submitted to the jury without objection or exception, upon the theory that the recent amendatory act did not apply; at least no pretense of that kind was made on the trial.

The jury returned a verdict for the plaintiff for the value of the property claimed; thereby finding that the sale by the bankrupt of the property in question to the defendants, who were his creditors, was fraudulent under the law.

In the charge to the jury no reference to the amended act was made; but they were instructed that the sale would be void, if they found from the evidence the several facts and propositions mentioned in the original act; to which charge no exceptions were taken.

On the second day after the verdict, the defendant's counsel filed a motion for a new trial, alleging that the court had charged erroneously upon the fourth proposition mentioned in section 35; that the amended act had changed that section, so that it was now necessary, in order to avoid a sale, that the jury should be instructed that they must find that the party knew that the sale was made in fraud of the provisions of the act, instead of that he must have had "reason to believe

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so." It was claimed, that as the last section of the amended act repealed all provisions of the old law inconsistent with its provisions, the old law was on that point absolutely repealed, and, it being in its nature penal, it could not be considered as existing for any purpose, and hence no sale could now be avoided unless it fell within the provisions of the amended law, irrespective of the time it was made. If this question had been raised at the trial, or there had been a request to so charge the jury, and I had so charged, the result would not, I think, have been different; for the evidence of the guilty knowledge of the defendants was overwhelming, so that, as far as the result of the case is concerned, it would have been wholly immaterial; and as this was a proposition that might have been changed, if the attention of the court had been called to it at the proper time, and as, in my opinion, it could not have affected the result, it presents a question of a purely technical character. I do not, therefore, feel that it would be right to set aside this verdict for that reason, or to allow that exception to the charge after verdict. When a charge is wrong in principle, and the error is of such a nature as not to have been avoided, if the attention of the court had been called to it at the time, by a proper exception or request, I allow an exception to be filed after verdict; but when it relates to a matter that might have been corrected on the spot without overthrowing the whole theory of the case, I think it due to the court and to the adverse party that the attention of the court should be called to it at the proper time. The rights of the successful party are involved, and the court should not sacrifice them.

This is a sufficient ground for denying the motion, but, as the question is one of great importance and of general interest, I think I may as well state a further reason for the denial, which covers the ground upon which the motion was based.

This was a case of involuntary bankruptcy, and the right of the assignee to recover back property transferred by the

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bankrupt in payment of his debts, from the creditor so receiving it, is not conferred by the 35th section of the act alone, but such right was given by section 39 also. So it becomes necessary to ascertain the effect of the amendments upon that section as well as upon section 35. Section 12 of the amended act changes section 39 by inserting the word "knew" instead of the words "reasonable cause to believe," in the original section, being thus like the third amendment to section 35. But section 39 as amended, provides that its provisions shall apply to cases commenced since December 1, 1873, so that, as to cases like this, commenced before that time, the original act was not changed. The class of cases to which it should apply being designated, it left all others to proceed as if it had not been passed. It, in that respect, was restrictive of its operation, and section 21, the repealing section, does not change or affect the original section as to cases commenced before that time, for that only repeals such acts and parts of acts as are inconsistent with the provisions of the amended act, and as the amended act, or this section of it, by its terms, only applies to cases commenced since December 1, 1873, it is not inconsistent with the original act except as to cases commenced since that time. Cases commenced before that time were excepted from its operation, and are not therefore affected by it, or repealed by the repealing section. As the right to maintain this suit, upon the grounds and provisions contained in the original section 39, remains unchanged and is clear, this motion for a new trial should be denied. The charge of the court being in conformity with that section, there was no error of which defendants can complain. In this view, it might be unnecessary to consider the effect of the amendments to section 35. But as I am satisfied that the construction contended for by defendant's counsel cannot be sustained, I will briefly state my reasons therefor.

Repeals by implication, or by a general clause like the one inserted in the repealing section of this act, which amounts

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to the same thing, are not favored, and are never extended beyond their necessary operation. . Repealing clauses of this kind are limited in terms to such provisions as are inconsistent with the amendatory act, and are never construed to include or alter provisions not embraced in the amendments. The amended act is not inconsistent with any other parts of the original act than such as are affected by its provisions. The repealing clause is co-extensive with the amendments and only applies where they do and when they do.¹ So that the effect of such a repealing clause is very different from what an absolute repeal of section 35 would have been.² Now if it should be held that the amendments to section 35 were intended to apply to cases occurring after the passage of the amended act, the repealing clause would only apply to such cases, for only as to those would there be any repugnancy. The original act, as to cases occurring before its passage, would remain unaffected by the repealing clause. Congress fixed the time for certain portions of the act to take effect before the passage (§ 12), and for certain others (§ 10), after; so, I think, the fair intendment is, that in cases where no other time was mentioned, they meant that the amendment should only apply to cases arising after its passage. This, under the circumstances, should be so considered as to such portions of it as changes the substantial rights of parties. I do not believe Congress intended to change the act, so as to make good, contracts that were void under the original act, or to change those provisions of the statute so as to affect contracts theretofore made. It would require a very clear expression by the legislature to give it such effect, or as being intended to vary the relations of litigant parties.³ If they had so intended

¹ *Spaulding vs. Alford*, 1 Pickering, 83.

² *Davies vs. Fairbairn*, 8 Howard, 636.

³ *Palmer vs. Conly*, 4 Denio, 374; *Paddon vs. Bartlett*, 3 Adolphus & Ellis, 884; *College of Physicians vs. Harrison*, 9 Barnwell & Creswell, 524.

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I think they would have expressed it in unequivocal language, as they did in the amendment of section 39.

There are many provisions of the act of a practical character that may properly be applied in further proceedings in all cases, such as those relating simply to the administration of the law, and as do not effect existing rights or the validity of contracts. Such provisions are of a remedial character, and may be presumed to have been intended to be applied to all cases. But such parts as relate to the substantial rights of parties, acquired under the original law, like the amendments to section 35, I think it must be held that Congress did not intend to apply to cases occurring before the adoption of the amendments.

The question was suggested as to what extent this amendment had changed the original act in the respect heretofore noticed, and I must confess it is not without its difficulties.

But it seems to me that in almost every case where the jury would be warranted in finding that the party "had good reason to believe," under the old statute, they would be justified in finding that he "knew," under the amended law, so that practically the amendment is merely a verbal one in that respect. It is a rule of universal application, in all cases of fraud on the part of the debtor, or seller of property, that notice of facts sufficient to put a party upon inquiry, amounts in judgment of law to notice, and is sufficient to charge the purchaser with knowledge of the matters and things it is reasonable to suppose such inquiry or investigation would have developed. Inquiry on the part of the purchaser having such notice, becomes a duty, and diligence an act of justice. A *scienter* may be shown by circumstances, and whatever fairly puts a party upon inquiry, when the means of knowledge are supposed to be at hand; if he omits to inquire, he does so at his peril, and he is chargeable with a knowledge of all the facts which, by a proper inquiry, he might have ascertained. 4 Kent, 179; *May vs. Chapman*, 16 Meeson & Welsby, 355; *Goodman vs. Simonds*, 20 Howard, 343; *The Lulu*, 10 Wal-

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lace, 192; *Hill vs. Simpson*, 7 Vesey, 152; *Smith vs. Low*, 1 Atkyns, 489; *Booth vs. Barnum*, 9 Connecticut, 287; *Pitney vs. Leonard*, 1 Paige Chancery, 461; *Carr vs. Hilton*, 1 Curtis C. C., 390; *Hawley vs. Cramer*, 4 Cowen, 717; *Scammon vs. Cole*, 5 Bankruptcy Register, 257. In some of these cases "notice" is used instead of "knowledge," but, as is said in *Goodman vs. Simonds*, 20 Howard, *supra*, it is usually in the same sense, and that is one of its appropriate significations. So, if, within the meaning of the provisions of the original section, a party had reasonable cause to believe, that, under the foregoing rule, would be sufficient to put him upon inquiry, and if reasonable inquiry would show that the sale was, in fact, a fraud upon the act, he would be chargeable with knowledge of that fact. Unless this well-settled rule is ignored there is no escape from this conclusion.

The motion for a new trial is denied.

The clause in section 5021 amending section 39 of the bankrupt law, by inserting the word "knew" instead of the words "had reasonable cause to believe," is not to be applied to proceedings in bankruptcy commenced before the 1st of December, 1873. *Tucker vs. Vankyke*, 8 Chicago Legal News. —[Reporter.

AMORY vs. AMORY *et al.*

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—JULY,
1874.

IN EQUITY.

1. **IMPEACHING DECREE.**—Fraud upon a party by her counsel in a state court will not invalidate a decree where it does not satisfactorily appear that it altered the result.

2. **WIDOW—PROOF OF HEIRSHIP.**—A woman claiming an estate from a man as his widow and heir-at-law, required in this case to give satisfactory proof, independent of her own statement, that she was actually the wife of the deceased.

3. **LACHES.**—If, soon after decree, the party has knowledge of facts calculated to throw suspicion upon the conduct of her counsel, she is bound to use due diligence in inquiring and in seeking relief, and a delay of eleven years bars any relief against the decree and the consequences of the fraud alleged.

This was a bill of Angelina Amory, claiming as widow and heir-at-law of James Amory, deceased, praying that the defendants, Samuel B. Amory and John Amory, executors, might be enjoined from pleading a decree of divorce by the Superior Court of New York city in bar of proceedings by the complainant to recover the estate of the said James Amory, and praying that the complainant might be adjudged the lawful widow and heir of said James Amory.

The bill alleged fraud by the complainant's counsel in the divorce proceedings in the New York court.

The facts are stated in the opinion, and more fully in the reported case in 3 Bissell, 266, where Judge Miller's opinion is given sustaining the demurrer filed to the bill.

Hearing before DAVIS and DRUMMOND, JJ.

Amory vs. Amory.

J. M. Gillett, Carpenter & Murphey and Levi Hubbell,
for complainant.

S. U. Pinney, for defendants. .

DRUMMOND, J.—The principal controversy in this case turns upon the effect of a decree of the Superior Court of the City of New York, as upon that must depend the right of the plaintiff to sustain the bill in this case, it being founded solely on the ground that she was, at the time of his death, the wife of James Amory, who died at Fond du Lac, Wisconsin, in August, 1868, intestate and without issue. In 1857, the plaintiff presented a complaint against James Amory in the Superior Court of the city of New York, alleging that she was married to him in that city, in 1846, and that they lived together as man and wife; that he had been guilty of adultery, and asking for a divorce on that ground.

James Amory answered the complaint and among other things, denied the marriage.

The case was submitted to a referee to report certain facts, and he reported that the plaintiff and James Amory had not been married, and that she could not, at the time of the alleged marriage, make a lawful contract of marriage, because she, at the time, had a husband, one William A. Williams, living. In October, 1860, the Superior Court confirmed the report of the referee, and adjudged that she was not, and never had been, the wife of James Amory, and that she should take nothing by her complaint, and that judgment be entered in favor of the said James Amory upon the merits, and against her.

She made various efforts to have this decree reversed or modified, but at the time of filing the bill in this case it was in full force.

1. We are of opinion that if any fraud was practiced or wrong done to her by her counsel in the conduct of the divorce suit in the Superior Court of New York, it was of such a character as not to change the effect of the decree of that

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court. It does not satisfactorily appear that he suppressed any evidence within his knowledge bearing upon the case. And upon the proofs before the referee and the court, it can not be said that the main fact found by the decree, or the decree itself, was unwarranted. If her counsel was acting in the interest of James Amory, as she alleges, it must appear that his wrongful act caused a decree which otherwise would not have been made. There is nothing in the evidence to show that any misconduct of the counsel altered the result.

2. In any event, it must appear as a fact that the plaintiff was actually the wife of James Amory. Undoubtedly the parties lived together as man and wife for some years, from which, in the absence of other evidence, a marriage might be inferred. But in this case there is such other evidence, and independent of her own statement, there is no satisfactory proof that a marriage ceremony ever took place between them. She was offered as a witness in the case, in the Superior Court, to prove it, but she was adjudged incompetent and it had to be determined by other testimony.

3. It appears that the plaintiff, not long after the decree was rendered in the Superior Court, had knowledge of certain facts, which, if true, were calculated to cast suspicion upon the conduct of her counsel. They were, at any rate, of such a character as to put her upon inquiry, and require her to use diligence to avoid the consequences of the fraud charged upon her counsel. This suit was not commenced till March, 1871, and we think she should not have waited so long before she asked for affirmative relief against the decree of the Superior Court of the City of New York.

We have not considered the other objections made by the counsel of the defendants to the relief prayed for in the bill.

The bill will be dismissed.

DAVIS, J., concurring.

Piek vs. Chicago & N. W. R. R. Co.

WILLIAM FREDERICK PIEK *et al.* vs. THE CHI-
CAGO & NORTHWESTERN RAILWAY COM-
PANY *et al.*

CIRCUIT COURT.—WESTERN DISTRICT OF WISCONSIN.—JULY,
1874.

IN EQUITY.

1. JURISDICTION.—The United States Circuit Court has jurisdiction of a bill by non-resident creditors to restrain the railroad commissioners from actions injurious to their rights. It is not necessary to wait until the commissioners have taken positive action.

2. Acts of March 12, 1874, do not repeal the Act of March 11, 1874.

3. ALTERING WISCONSIN RAILROAD CHARTERS.—The provision of the Wisconsin Constitution, that railroad charters "may be altered or repealed by the Legislature at any time after their passage" underlies all the grants of rights and franchises to the Northwestern Railway Company, and all its stock and securities were taken and are held subject to this paramount condition, of which in law all holders had notice.

4. RIGHTS OF CREDITORS.—The corporation cannot clothe its creditors with greater rights, as against the state, than it possesses itself; and this principle is not changed by authority from the Legislature to consolidate with other roads.

5. The Wisconsin Legislature has the power to regulate railroad charges for transit of persons and property within the state, and the fact that the exercise of such power might affect the value of the railroad's property and franchises cannot touch the question of the power.

6. CONGRESSIONAL GRANTS OF LAND TO THE STATE cannot change the rights of the corporation or its creditors.

This was a bill in equity by William Frederick Piek, of the kingdom of Holland, and an alien, Henry R. Pierson and Moses Taylor, citizens of the state of New York, holders of certain bonds issued or guaranteed by the Chicago & Northwestern Railway Company, filed on behalf of themselves and

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others similarly situated, and also by the Farmers' Loan and Trust Co., and the Union Trust Co., corporations organized under the laws of New York, and citizens of that state, being severally trustees under mortgages executed by said railway company to secure the aforesaid bonds, against the said Chicago & Northwestern Railway Company, George H. Paul, Joseph H. Osborne and John N. Hoyt, citizens of the state of Wisconsin, and Railroad Commissioners of that state, and also against A. Scott Sloan, a resident of and the attorney-general of said state.

The bill was filed to restrain the said railway company from submitting to or accepting, and to prevent the other defendants from enforcing, the provisions of an act of the Legislature of the state of Wisconsin, passed March 11, 1874, entitled "an act in relation to railroad, express and telegraph companies, in the state of Wisconsin,"¹ upon the ground that the act impaired the obligation of the contracts entered into by said railroad company with said bondholders and trustees, and was therefore unconstitutional and void.

The defendant corporation was created by the consolidation of several railroad companies organized under the laws of Illinois and Wisconsin respectively, the new corporation being confirmed by the act of the legislature of Wisconsin, approved March 8, 1862.

By act of Congress, June 3, 1856,² there was granted to the state of Wisconsin certain alternate sections of land within the state for the purpose of aiding in the construction of railroads. The state accepted the lands, and on the 11th of October, 1856, passed an act professedly in execution of the trust created by this act of Congress, and incorporating the Wisconsin and Superior Railroad Company, and granting a portion of said lands thereto. This corporation was finally merged into the Chicago & Northwestern Railway Company.

¹ Laws of Wisconsin for 1874, 559.

² 11 U. S. Statutes at Large, 20.

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The act complained of in the bill, is that of the legislature of Wisconsin, approved March 11, 1874, applicable to all the roads within the state, owned, operated, managed or leased by the Chicago & Northwestern Railway Company, limiting the compensation to be paid for the carriage of passengers and freight to the sums in the act mentioned, prohibiting under heavy penalties any demand or receipt of compensation beyond the rates so fixed, and providing for the appointment of three persons as railroad commissioners, who should neither be in the employment of any railroad, nor in any manner interested in railroads, who should at all times have access to the books and papers of railroad companies throughout the state, and authorizing them in their discretion to reduce such rates of compensation below those prescribed by the act whenever in their judgment, or in the judgment of a majority of them, it could be done without injury to the railroad company, and also providing that such companies should be bound by the decision of such railroad commissioners, or a majority of them, with reference to such rates, and should observe their requirements in that respect, under heavy penalties.

Under this act the defendants, Paul, Osborne and Hoyt, had been appointed the railroad commissioners for the state, had entered upon the duties of their office, prepared a schedule of rates for transportation of freight and passengers, and were preparing to enforce the observance thereof, while the defendant Sloan, as attorney-general was preparing to prosecute the company for the penalties prescribed for the violation of the act, the company having made no change in their rates on account of the act.

The question came up on a motion for a temporary injunction on the bill and affidavits filed, and was elaborately argued.

Motion heard before DAVIS, DRUMMOND and HOPKINS, JJ.

C. B. Lawrence, B. C. Cook, and E. W. Stoughton, for complainants.

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A. Scott Sloan, J. C. Sloan and L. S. Dixon, for defendants.

DRUMMOND, J.—We have not had time to prepare any formal opinion in the case, but as it was thought desirable that there should be a decision upon the motion for an injunction, I am instructed by the court to present the following as its conclusions upon the points made for a preliminary injunction:

1. On the assumption that the act of March 11, 1874, "relating to railroads, express and telegraph companies in the state of Wisconsin," is invalid, we think the court has jurisdiction of the case. The bill is filed on behalf of citizens of Europe, and of other states, to enforce equitable rights, and to prevent action by the railroad commissioners which may result, as is alleged, in serious injury to those rights. It was not necessary to wait until the commissioners had put the law in full operation, and its effects upon the railroad company had become complete, before the application against them was made to a court of equity. A very important function of that court is to prevent threatened wrong to the rights of property.

2. We are of opinion that the act of the 11th of March mentioned above was not repealed by the act of the 12th of March, 1874, the second section of which declares "all existing corporations within this state shall have and possess all the powers and privileges contained * * in their respective charters;" and the act also of the 12th of March, 1874, the ninth section of which imposes a penalty for extortionate charges. There are apparent inconsistencies between these two last named acts and that of the 11th of March; but it becomes a question of intendment on the part of the legislature. On the same day, March 12, a joint resolution was passed directing the secretary of state not to publish the act of the 11th of March until the 28th of April. In this state no general law is in force until after publication. We may consider the joint resolution, in order to determine whether the ambiguous legislature intended that the two acts passed on the

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same day should repeal the act of the 11th of March, and from that it is manifest such was not the intention of the legislature. Of the three acts, that of the 11th of March took effect last.

3. The charters of railroad corporations under the constitution of Wisconsin "may be altered or repealed by the legislature at any time after their passage." In legal effect, therefore, there was incorporated in all the numerous grants under which the Northwestern Railway Company now claims its rights of franchise and property in this state, the foregoing condition contained in the constitution. It became by operation of law, a part of every contract or mortgage made by the company, or by any of its numerous predecessors, under which it claims. The share and bondholders took their stock or their securities subject to this paramount condition, and of which they, in law, had notice. If the corporation, by making a contract or deed of trust on its property, could clothe its creditors with an absolute, unchangeable right, it would enable the corporation, by its own act, to abrogate one of the provisions of the fundamental law of the state.

4. This principle is not changed because authority is given by the legislature of the state to a corporation to consolidate with a corporation of another state. The corporation of this state is still subject to the constitution of Wisconsin, and there is no power anywhere to remove it beyond the reach of its authority.

5. As to the rates for the transit of persons and property exclusively within the limits of this state, the legislature had the right to alter the terms of the charter of the Northwestern Railway Company, and the fact that such alteration might affect the value of its property or franchises cannot touch the question of power in the legislature. The repeal of its franchises would have seriously impaired the value of its tangible property; and while the latter, as such, could not be taken, still its essential value for mere use on the railroad would be gone.

6. The fact that grants of land were made by Congress to

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the state cannot change the rights of the corporation or of the creditors. If the state has not performed the trust it must answer to the United States.

7. The act of the 11th of March, 1874, while not interfering with the rates of freight on property transported entirely through the state to and from other states, includes within its terms property and persons transported on railroads from other states into Wisconsin, and from Wisconsin into other states. This act either establishes or authorises the railroad commissioners to establish fixed rates of freight and fare on such persons and property. The case of *The State Freight Tax*, in 15th Wallace, p. 232, decides that this last-described traffic constitutes "commerce between the several states," and that the regulation thereof belongs exclusively to Congress. It becomes, therefore, a very grave question whether it is competent for the state arbitrarily to fix certain rates for the transportation of persons and property of this inter-state commerce, as the right to reduce rates implies also the right to raise them. There may be serious doubts whether this can be done. This point was not fully argued, and scarcely at all by the counsel of the defendants; and under the circumstances, we do not at present feel warranted, on this ground alone, to order the issue of an injunction. If desired by the plaintiffs, it may be further considered at a future time, either on demurrer to the bill or in such other form as may fairly present the question for our consideration.

The motion for an injunction is overruled.

An act in 1856 reserving power to amend or repeal future charters and other laws is constitutional, and does not affect the mere power to repeal the franchise, notwithstanding the clause that "No amendment or repeal shall impair other rights previously vested." Therefore an act of 1868, repealing one incorporating a company in 1865, is constitutional, notwithstanding the act of 1865 reserved no repealing power in itself. *Griffin vs. Kentucky Insurance Company*, 3 Bush, Kentucky, 592.

The exercise of a reservation by the state of the power to repeal, alter or amend acts of incorporation, does not impair the contract of which it forms

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a part. *Commonwealth vs. Fayette County Railroad Company*, 55 Pennsylvania State, 452.

The Constitution of Wisconsin contains the following clause: "Corporations without banking powers or privileges may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general laws or special acts enacted under the provisions of this section may be altered or repealed by the legislature at any time after their passage." Article XI, Section 1, Constitution of Wisconsin.—[Reporter.

EDWIN M. HUKILL vs. BENJAMIN V. PAGE *et al.*

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—AUGUST,
1874.

REMEDY AGAINST TRUSTEE.—The remedy of the *cestui que trust* against the trustee for negligence must be in equity, not at law.

Action on the case by plaintiff, holder of certain bonds of the Riverside Improvement Company, secured by deed of trust to the defendants, the declaration alleging that the plaintiff purchased the bonds relying upon the security of the trust deed, but that the defendants wrongfully executed and delivered to the said company a release of said trust deed, which was duly filed for record, whereby plaintiff's bonds became of little or no value.

Defendants file general demurrer.

Lawrence, Winston, Campbell & Lawrence, for plaintiff.

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Geo. W. Smith, and *Ayer & Kales*, for defendants, cited: *Alton vs. Midland Railway Company*, 115 English Common Law Reports, 218; *Himes vs. Keighblinger*, 14 Illinois, 469; Saunders on Pleading and Evidence, 726; Perry on Trusts, §843; 1 Chitty on Pleading, 60; Hill on Trustees, 42; 2 Story's Equity Jurisprudence, §962; *Dias vs. Brunell*, 24 Wendell, 8; *Bartlett vs. Dimond*, 14 Meeson & Welsby, 49; *Pardoe vs. Price*, 16 do., 450.

BLODGETT, J.—Inasmuch as no fraud was charged, but negligence only is alleged in the declaration, the remedy should be by a bill in chancery. It is possible that an action on the case might lie against the trustees if fraud were alleged, but as plaintiff simply alleged negligence the only remedy is in equity. The demurrer will be sustained and leave given to amend, if the plaintiff thinks he can make a good declaration.

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In re PERKINS et al.

DISTRICT COURT.—WESTERN DISTRICT OF WISCONSIN.—SEPTEMBER, 1874.

IN BANKRUPTCY.

1. DISCHARGE SINCE AMENDMENT OF JUNE 22, 1874.—In cases commenced before above date both voluntary and involuntary bankrupts may be discharged without reference to the amount of their assets, or the number of creditors assenting.

2. DEBTS SHOULD BE CLASSED AS OF DATE OF CONTRACTION.—A renewal note is but an evidence of the debt, and the bankrupt should be allowed to show when it originated; and if before January 1, 1869, it should be classed as a debt contracted before that date.

3. LIABILITY OF PRINCIPAL TO SURETY—must be considered as having been contracted when the instrument was signed, not when the surety made payment.

Orton, Keyes & Chynoweth, for creditors.

Cassoday & Carpenter and *Geo. B. Smith*, for bankrupts.

HOPKINS, J.—The above-named bankrupts, who were adjudged such, on their own petition, in March, 1873, in January last filed a petition for their discharge. Parker & Stone, two of their creditors, opposed it, on the ground: 1st, that their assets did not amount to 50 per cent. of their debts; and, 2d, that they had not the assent of a sufficient number of their creditors. These objections, although filed before the recent amendments, were not brought to a hearing until after, and, as a matter of course, the first question which arose was as to the effect of those amendments. The counsel for the creditors claimed that the amendments applied, and had changed the prior conditions upon which a discharge might

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be granted, and maintained that under section 9 of the act of June 22, 1874,¹ these bankrupts, as these proceedings were voluntary, could not be discharged unless their assets were equal to 30 per cent. of their debts, or the prescribed number of their creditors had filed their consent thereto; that the other exceptions in section 33 of the original act, as amended, were repealed, and that it was now immaterial when the debts were contracted; that no discharge could now be granted unless the assets equaled 30 per cent. of all debts.

These various positions were controverted by the bankrupts' counsel. So it becomes necessary, first, to determine whether the provisions of section 9 of the act of 1874 apply to cases pending, where an adjudication had been made before that act passed. On this question I am assisted by the opinion of Judge Blatchford in *In re Francke*, 6 Chicago Legal News, 414, S. C. 10 B. R., 438. In that case he holds that this section (9) is prospective only, that its provisions do not apply to pending cases, and that the provisions upon the same subject in the prior acts are not repealed by section 21 of the act of 1874, as to pending cases, because (he says) the provisions of section 9 have reference only to cases commenced after the passage of the act of 1874.

The conclusion that section 21 does not repeal the prior statutes as to pending cases is incontrovertible, provided section 9 does not apply to such cases, for there would be no inconsistency between the acts unless they both applied to the same case or cases. So when it is settled that the last act refers only to future cases, it follows as a necessary sequence that the former acts are not repealed as to pending cases. I fully concur with the learned judge in his interpretation of the amended act, and agree with him that the provisions of the 9th section apply only to cases commenced after its passage. His views are in accord with those I expressed in *Hamlin*,

¹ 18 U. S. Statutes at Large, 180.

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assignee, etc. vs. Pettibone,¹ in construing another provision of the act of 1874. I held in that case that section 11 applied to cases commenced after the passage of the act, and was not intended to apply to cases pending when passed, so as to make contracts valid that were void by the terms of the prior statutes,² and that the repealing clause in section 21 was inoperative, except as to cases where the provisions of the amended act applied, and that as those provisions, then under consideration, did not apply to pending cases, the prior statutes were in force and unaffected by the repealing clause of the amended act.

The learned Judge, in his opinion, referred to section 17, not noticed by me, as bearing upon the question as to what cases Congress intended the provisions of the amended act to affect. In that section it is enacted that "its provisions shall apply to cases of bankruptcy now pending or to be hereafter pending," from which, as well as from sections 10 to 12, it is fair to infer that the general provisions of the act were not intended to apply to pending cases. The general rule is that statutes are to have a prospective operation. In *Harvey vs. Tyler*, 2 Wallace, 328, it is said that "it is a rule of construction that all statutes are to be considered prospective, unless the language is expressly to the contrary, or there is a necessary implication to that effect." And in *United States vs. Heth*, 3 Cranch, 399, 413, that "words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied."³ The act of 1874, construed according to these rules, must be held to apply to future cases except when otherwise provided.

¹ *Ante*, p. 167.

² *Hackley vs. Spragus*, 10 Wendell, 113; *Morton vs. Rutherford*, 18 Wisconsin, 298.

³ *Sohn vs. Waterson*, 17 Wallace, 596.

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If this were all there was of the 9th section I should hold that the provisions of the prior law in reference to the conditions upon which a discharge could be granted were still in force. This section, in the first place, provides, that in involuntary cases the provisions of the original act, and of the amendments and supplements thereto, requiring the payment of any proportion of the debts by the bankrupt as a condition of his discharge, shall not apply; but that he may be discharged the same as if he had paid the required amount or had procured the consent of the requisite number of his creditors thereto.

But these provisions, according to our construction, only apply to cases commenced after the passage of the act, and do not authorize a court to order a discharge in pending cases without a compliance with the provisions of the prior statutes.

The next provision of the section (9) applies to voluntary cases, and reduces the value of assets from 50 to 30 per cent. and the proportion of creditors from one-half to one-fourth, to entitle a party to a discharge.

But this provision, like the preceding one, only applies to future cases, and does not affect the law as to existing cases.

If this were all there was of the section I should have no hesitancy in holding that the power of the court in granting discharges in pending cases was not changed. But it is not all. After prescribing these new conditions as to future cases, it reads: "and the provisions of section 33 of said act of March 2, 1867, requiring fifty per cent. of such assets, is hereby repealed." This cannot be treated as mere tautology. It must have some significance. It is true that section 33 had been amended by the act of July 27, 1868,¹ by inserting among other things, in lieu of the word "pay," the words "equal to," but the 50 per cent. clause was retained.

The same section was further amended by the act of July 14, 1870,² by declaring that the second clause of section 33, of

¹ 15 U. S. Statutes at Large, 227; R. S., 1874, §5112.

² 16 do., 276; R. S. 1874, §5112.

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the act of 1867, as amended by the act of 1868, should not apply to debts contracted prior to the first day of January, 1869.

Now, it seems to me that the obvious intention of this repealing clause in section 9 was to repeal the existing law requiring assets of the value of 50 per cent. of debts as a condition of obtaining a discharge. Unless this was the intention of Congress, the clause is destitute of meaning or operation. It is an express repeal of the provision of what was evidently supposed by Congress to be the law. It is different from the repealing clause in section 21, which depends wholly upon repugnancy. Judge Blatchford construed it as only repealing the section as originally passed, leaving the act of 1868 amending it in force. I think such construction too strict, and as not carrying out the palpable intention of Congress. It virtually nullifies the whole effect of the clause.

Technically, the 33d section of the act of 1867, in such respects as it has been changed by the amendatory act of 1868, had been repealed, so that unless the clause can be construed as embracing not only the original section and its amendments, or the "section as amended," as it is spoken of in the act of July 14, 1870, it really has no significance or operation.

It was unnecessary to insert such a clause for the purpose of giving effect to the 30 per cent. clause which preceded it, for, that, being inconsistent with the 50 per cent. clause in the prior statutes, was repealed by implication, so that unless it repealed the 50 per cent. requirement in the prior acts, I do not see that any effect can be given to it, which is contrary to all rules governing the construction of statutes. It is uniformly held to be the duty of courts to so construe a statute as to give effect to every part and clause if possible, and in this case effect can only be given to this clause, by holding that the repeal covers the 50 per cent. clause in the original section, and in the amendments of 1868.

I am, therefore, constrained to differ with the learned judge upon the meaning of this repealing clause, and must hold that the repeal of the provision "requiring 50 per centum of such

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assets," applies to the amendatory act of 1868, as well as to the act of 1867.

The changes made by the act of 1874 are clearly in the interest of the debtor, and may be regarded as a disapproval by Congress of the energetic provisions of the original act as to him, and as expressive of its intention to relieve him of many of its requirements, among which the conditions imposed upon his obtaining a discharge were perhaps the most embarrassing. Having been often needlessly thrown into bankruptcy and ruined in business, it was not unnatural to increase the facilities for his discharge, by authorizing the court to order a discharge without reference to the amount of his assets in cases theretofore commenced. As the creditor had previously possessed great facilities for proceeding against him, it is apparent that Congress meant to give him increased facilities to obtain his rights—a discharge. This seems to be the spirit and meaning of the act of 1874, and I therefore hold that parties in both voluntary and involuntary cases, commenced before the 22d of June, 1874, may be discharged without reference to the question of the amount of assets, or the number of creditors assenting, provided they comply with the law in other respects.

But if I am wrong in this view, there is another answer to the objections interposed. If the statutes of 1868 and 1870 are in force, they do not include debts contracted before the first day of January, 1869. The claims proved up by the creditors opposing the discharge, are upon notes dated since that time, but the evidence, on the hearing, shows that they were given in renewal of notes given for a debt contracted before the 1st day of January, 1869. Now, when was the debt contracted? when the renewal notes were given, or when the liability was incurred? Notes are but the evidence of a debt, and the holder may surrender them and recover on the original consideration at his option. They are presumptively

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but an extension of the time of payment.¹ The relation of debtor and creditor is considered for remedial purpose as having existed from the origin of the liability, and on application for a discharge, a bankrupt should be allowed to show when the debt originated or was contracted, and if before the 1st of January, 1869, I do not think a note given after that time would bring it within the category of a debt contracted after that date. But it is insisted that this is not a complete answer to the objection, as the opposing creditors Parker & Stone were sureties for the bankrupts upon the notes, and have paid them, and proved their claims as sureties thereon. This is so, but the evidence shows also that they were sureties upon the original notes given before the 1st of January, 1869. The proof also shows that they did not pay until after January, 1869, and that they have proved their claim as of the date of payment, and they insist that as between them and the bankrupts the debt must be considered as contracted at that time.

Section 19 in the bankrupt act authorizes sureties, indorsers and persons liable for the bankrupt to prove the debt for which they are liable, when not proven by the creditor, without first paying it, and such debts being provable are released by the discharge. Now, does the payment change the relation of the parties? A surety cannot sue his principal at law until he has paid, and in such case, the suit is not upon the note, but for money paid at the request of the principal. But the contract that the principal will pay the surety if he has to pay the debt arises at the time of making the instrument. The promise is implied from the request and signing. The obligation of the principal arises when the surety becomes liable for his debt.² The surety's right of action is not complete until he pays, so the statute of limitations does not begin to run until that time. This liability of the principal is

¹ *Cole vs. Suckett*, 1 Hill, 516; *The Kimball*, 3 Wallace, 37.

² *Siedman vs. Martinant*, 15 East, 427.

In re Perkins.

recognized by the bankrupt act in the provision that allows him to prove the claim before payment. I therefore hold that within the meaning of the bankrupt act, the liability of the principal to his surety must be considered as having been contracted when the instrument was signed.

This conclusion is supported by the cases of *Mace vs. Wells*, 7 Howard, 272; *Baker vs. Vasse*, 1 Cranch, C. C., 194; *Craft vs. Mott*, 4 Comstock, 604, and *Vansandau vs. Corsbie*, 8 Taunton, 550. As in this case the signing was before January 1, 1869, it necessarily follows that the opposing creditors do not occupy a position to insist upon payment of any portion of their debt before it can be discharged. Their objections are overruled and discharge ordered.

This decision is approved and followed in the District of Indiana. *In re Montgomery*, 12 B. R. 315.

Upon the point decided in this case there is some conflict of opinion, but the weight of authority appears to sustain the construction here given. Such is the uniform practice in the Northern District of Illinois, where Judge BLODGETT has uniformly granted discharges to both voluntary and involuntary bankrupts in such cases, irrespective of the amount of assets or number of creditors assenting.

It has been approved and followed by Judge BLODGETT in the Northern District of Illinois, *In re Jones and Hoyt*, 12 B. R., 48, and by Judge MILLER, of the Supreme Court, *In re King*, 10 B. R., 566. In *In re Geo. H. Sheldon*, 12 B. R., 63, Judge BLATCHFORD re-affirms his construction of the act in the *Krancke* case.

In *In re Cerf*, 11 B. R., 143, the court appears to have held that the amendment of June 22, 1874, applied to all cases, whether commenced before or after the passage of the amendment, and that in cases commenced before the amendment the bankrupt, in order to secure a discharge, must have assets of 80 per cent., or procure the assent of $\frac{1}{2}$ in value and $\frac{1}{4}$ in number of his creditors, and the same opinion is held in *In re Griffiths*, 10 B. R., 456.

The amendment of June 22nd, 1874, to the Bankrupt Act, does not effect cases commenced before December 1, 1873, nor does the repealing clause affect suits by assignees then pending. The amendments are not inconsistent with the original act except as to cases commenced since December 1, 1873. *Hamlin, Assignee, &c., vs. Pettibone*, ante p. 167.

A petition filed on the same day that the amendment was approved, is governed by it, as the amendment took effect the beginning of the day it

In re McDowell.

was approved, and the amendment is retrospective as to pending cases where there had been no adjudication. *In re Williams & McPheders*, post p. 233. In cases of compulsory bankruptcy actually commenced, though not determined, prior to December 1st, 1873, the amendments of June 22d, 1874, do not apply, and in voluntary cases, undetermined as well as compulsory cases, section 9 of the amendatory act governs. *Singer Assignee &c.*, vs. *Sloan et al.*, 11 B. R., 433.—[*Reporter*.

In re McDOWELL.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—SEPTEMBER, 1874.

IN BANKRUPTCY.

SECOND COMPOSITION MEETING.

As a general rule a bankrupt should abide by the decision of a composition meeting duly held; but if it clearly appears that the object of the meeting failed by reason of the mistakes or mis-instructions of attorneys for creditors, the court may order a second meeting.

McClellan & Hodges, attorneys for petitioners.

T. S. McClelland for respondents.

BLODGETT, J.—Upon the application of the debtors, an order was made in this case calling a meeting of their creditors, to be held before one of the Registers of the court, on the 26th day of August last, for the purpose of considering and acting upon a proposition for a composition. The Register reported that the meeting was duly held; that the debt-

In re McDowell.

ors were in attendance and submitted their proposition to pay thirty cents on the dollar in full satisfaction and discharge of their debts; that the creditors in attendance, represented by their attorneys, were twelve in number, three of whom voted in favor of accepting said proposition, and nine, by their attorneys, voted against accepting the same. The debtors now apply for another meeting, and state in substance, by their petition, that the attorneys who represented the creditors voting against said proposition at said first meeting, did not understand the wishes of their clients, and had not so fully investigated the affairs of the debtors as to be properly advised in the premises. It also appears from the statements of the attorneys who represented said dissenting creditors at said meeting, that certain members of their respective firms had had the matter of this proposed composition specially in charge and were fully informed of the facts, and had determined to vote in favor of the debtors' proposition, but that said members of the attorneys' firms were out of the city at the time the meeting was held, and the partners who attended and represented said creditors, not finding among their papers any instructions from their clients or absent partners, voted *pro forma* against the proposition.

As a general rule, I think that when a debtor has had a meeting of his creditors duly called and held, and has had his proposition for a settlement duly considered and passed upon, he should abide by the decision then had, and not be permitted to annoy creditors by requiring their attendance at further meetings. But in this case it clearly appears that the object of the meeting failed, by reason of the failure to properly instruct the attorneys who represented the dissenting creditors, and I shall therefore direct another meeting to be called for the purpose of again considering and acting upon the debtors' offer for a composition.

While, as I said before, I would not allow a practice which would vex creditors with meetings after they had intelligently acted upon a debtor's offer, yet I think the court should af-

In re Scammon.

ford all proper facilities for correcting mistakes, or enabling the parties most interested to carry out their wishes in the premises. Here both the debtor and the dissenting creditors are willing a second meeting should be called, and I can see no valid reason why it should not be done.

In re J. YOUNG SCAMMON.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—OCTOBER, 1874.

IN BANKRUPTCY.

PRACTICE IN FILING PETITION UNDER AMENDMENT OF JUNE 22, 1874.

Under the amendment of June 22, 1874, if it appears that the requisite number of creditors have not joined in the petition, the court will dismiss it on motion, without requiring the debtor to file a schedule.

On such motion the court will hear affidavits and evidence offered by either party, and will order the person verifying the petition to be examined before the register.

This was an involuntary petition filed by the United States Mortgage Company against Jonathan Young Scammon, prior to the amendment of June 22, 1874. Soon after that amendment a rule was entered upon the petitioning creditor to file an amended petition according to the requirements of this amendment.¹ In response to this, it simply amended the petition by inserting the allegation that the petitioning cred-

¹ *Ante* p. 130.

In re Scammon.

itor constituted one-third in amount and one-fourth in value of the respondent's creditors.¹

Respondent then moved to dismiss the petition, filing an affidavit to the effect that he was indebted in large amounts to numerous persons; that two judgments were standing against him in the United States Court for this district, and several others in the state courts, and that the secretary of the company, when he made the affidavit to the amended petition, knew that respondent was indebted to a large number of persons.

Lyman Trumbull, for the motion.

Wirt Dexter, *contra*.

BLONDETT, J.—Since the recent amendment to the bankrupt act, the petition is required to show with as much certainty as is attainable that the creditors uniting in the petition actually constitute the proportion required by the act. But inasmuch as it is usually impracticable for a creditor to give a full or precise statement of the debtor's liabilities, I have held that the allegation might be made upon information and belief. The petitioning creditors must, however, be held to good faith in the matter, and cannot recklessly file a petition for the purpose of making the respondent file a statement of his creditors. It would be intolerable if any one or two creditors, upon either a real or pretended claim, could by a simple allegation, in the words of the amendment, compel a business man to spread upon the records a statement of his liabilities. Such a fishing petition cannot be entertained under the act as amended. If it appear to the court by affidavit, or otherwise, that at the time of filing the petition the creditors joining in it knew that they did not constitute the requisite number, the petition should be dismissed; and it seems

¹ See *ante* p. 145.

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to me that a motion is the proper method in which to bring the matter before the court. Upon this question both parties have the right to be heard. Either party may bring in affidavits or evidence by Saturday morning next, and the respondent may have an order for examination and cross-examination before the register of the secretary of the company who made the affidavit.

UNION TRUST COMPANY vs. ROCKFORD, ROCK
ISLAND & ST. LOUIS R. R. CO.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—OCTOBER,
1874.

CONFLICT OF JURISDICTION.

1. It is the settled rule of law that the court which first takes cognizance of the controversy is entitled to retain jurisdiction to the end of the litigation, and to take possession and control of the subject-matter of the litigation, to the exclusion of all interference from other courts of co-ordinate jurisdiction.

2. **POSSESSION OF THE *Res.***—This rule does not require that the court first taking jurisdiction of the case shall also first take possession of the property; and a prior seizure from another court does not give priority of jurisdiction.

3. **POWER OF COURT OVER JUDGMENT**—to set aside, modify or annul, is unlimited during the term at which they were rendered.

4. Where a demurrer to a bill is sustained and bill dismissed, the court may, during the term, set aside its dismissal and restore the case without losing its jurisdiction, and a state court cannot, by taking jurisdiction during this interval, oust or supersede the jurisdiction of this court. The case stands precisely as though no order of dismissal had been made.

5. **REFUSAL TO RESUME JURISDICTION.**—The cases where courts have refused to set aside their judgment and proceed with the case, in order to protect their parties acting in good faith, are cases of equitable discretion, not of right, and do not contravene the rule.

Union Trust Co. *vs.* Rockford, R. I. & St. L. R. R. Co.

Lyman Trumbull, for Union Trust Co.

Lawrence, Winston, Campbell & Lawrence, for Nickerson.

Osborn & Curtis, for Rockford, R. I. & St. L. R. R. Co.

BLONDETT, J.—It is not proposed to review at length the able and exhaustive argument of the counsel for the respective parties in this case, as it seems to us that a few of the propositions discussed are sufficient for the purpose of this motion. The main question arising is one of great delicacy, and the history of the jurisprudence of this country shows a most commendable disposition on the part of both the federal and state courts, not to impinge upon each other's jurisdiction; but the delicate nature of the matter furnishes no reason why the court to which jurisdiction belongs should not firmly assert and maintain its rights. The subject of this controversy is equally within the jurisdiction of the state and federal courts, always assuming the jurisdiction of the federal courts to be invoked by persons authorized to bring suit in those courts.

It will hardly be necessary to cite authorities to show that it is, and has long been, the settled rule of law in all cases of conflict of jurisdiction, that the court which first takes cognizance of the controversy is entitled to retain jurisdiction to the end of the litigation, and incidentally to take the possession of or control the *res*, the subject-matter of the dispute, to the exclusion of all interference from other courts of co-ordinate jurisdiction.¹ The proper application of this rule does not require that the court which first takes jurisdiction of the case shall also first take, by its officers, possession of the thing in controversy, if tangible and susceptible of seizure, for such a rule would only lead to unseemly haste on the part of officers to get the manual possession of

¹ *Bell vs. Ohio, L. & T. Co.*, 1 Bissell, 260; *Riggs vs. Johnson County*, 6 Wal. 166; *Bill vs. New Albany &c. R. R.*, 2 Bissell, 390; 1 Abbot's U. S. Practice, 223, and cases cited.

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the property; and while the court first appealed to was investigating the rights of the respective parties, another court, acting with more haste, might, by a seizure of the property, make the first suit wholly unavailing. To avoid such a result, the broad rule is laid down that the court first invoked will not be interfered with by another court while the jurisdiction is retained.

It is also equally well settled that the power of a court over its judgments, to set aside, modify or annul, is unlimited during the entire term at which such judgments are rendered.¹

The common law rule, that an execution will not issue until the close of the term, is but a familiar illustration of the proposition. So, too, as a general rule, the liens of judgment do not attach till the close of the term, and all for the reason that during the term a judgment is *in fieri* in the breast of the court, liable to such modifications or reversal as shall seem best to subserve the ends of justice.

The right of a court of equity to allow amendments to a bill, and to allow the filing of a supplemental bill at any time during the term, after having sustained a demurrer to the bill, was conceded upon the argument to be a general rule, subject, however, to the exception contended for, that when the court, by its judgment on the demurrer, dismissed the case out of court, it could not resume jurisdiction as against third parties who had in good faith acquired rights while the judgment of dismissal remained in force.

Applying these propositions to the facts of this case, we find that this court, on the 20th of July last, sustained a general demurrer to complainant's bill, and entered judgment dismissing the suit. On the 22nd of July, Nickerson filed his bill in the state court, and made his motion for a receiver. On the 24th of July, which was yet of the same term at which

¹ *Doss vs. Tyack*, 14 Howard, 297; *O'Connor vs. Mullen*, 11 Illinois, 116; *Walden vs. Craig*, 14 Peters, 147.

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the demurrer was sustained, the order dismissing the cause was set aside in this court, on motion of the complainant's solicitors, and leave to amend and file a supplemental bill given; and on the 25th of July, Nickerson, by consent of the defendant, obtained an order, appointing receivers in the Henry County Circuit Court. The solicitors of Nickerson had notice of the motion to amend in this court, and under the facts in this case, Nickerson is chargeable with notice of the action of this court in the premises, and that this court had resumed jurisdiction of the suit before he took his order appointing a receiver. Nickerson was not a stranger to this suit. He had appeared by his counsel on the argument of the demurrer, and resisted the complainant's suit, although not technically a party to the record. He was then chargeable with actual as well as constructive notice that this court might, at any time during the July term, set aside its judgment on the demurrer and proceed with the case. When the order was made by this court, setting aside its judgment of dismissal, the case stood as if that judgment had never been rendered. The court had never lost jurisdiction. Suppose, for illustration, the complainant had appealed within sixty days, as he might, or at any time during the term, from the judgment of this court, and the appellate court had reversed our judgment, it would not, of course, be contended that the jurisdiction of another court could attach by any form of proceeding so as to divest this court of jurisdiction; and yet a complainant is not bound, in order to save jurisdiction, to pray an appeal instantanor a judgment or decree is rendered against him. He may lie still and take no action for days, perhaps months, and then by taking his appeal in due form all rights of jurisdiction are preserved intact. So, too, instead of resorting to an appellate court, the complainant may ask this court to revise its own order or decree, and in furtherance of justice such request may be granted and the former judgment annulled and set aside any time during the term.

We find, then, that this court had not lost jurisdiction of

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this case when the suit in Henry county was commenced; and although the suit was technically dismissed on our record, from the 20th to the 24th of July last, yet it was all the time subject to the power of the court to set aside that order; and Nickerson could not, by commencing a suit in another county, supersede the jurisdiction of this court over the subject matter. Undoubtedly cases may be found where courts have in their discretion refused to set aside their judgment, and proceed with the case, after having once dismissed it, where the rights of parties, acting upon the faith that the dismissal was final, had intervened; but such cases are an exception to the general rule, as a matter of equitable discretion, rather than of right, and are for the protection of those acting in good faith. In this case, both Nickerson and the defendant, the railroad company, seem to have left this court, and rushed in haste into the state court, and there consented to the appointment of receivers, while they had strenuously resisted such appointment here. This fact, with others, appearing in the record, tends strongly to prove that the proceeding in the Henry County Circuit Court was not commenced by Nickerson in good faith, and that the case does not come within the exceptions which have been cited.

The necessity for the appointment of a receiver was not discussed on the argument, for the reason, as we infer, that the defendant, by consenting to such an appointment by the state court, has virtually admitted its necessity.

DRUMMOND, J.—I concur in general in the views of the district judge. I may be allowed to express the hope that there will be no trouble growing out of this decision, and that the state court will not insist upon its receiver retaining control of the property. If it should, it may then become a question for this court to determine what course shall be pursued if the receiver appointed by this court shall seek to obtain possession of the property, and should be resisted by the receiver appointed by the state court. The only question there is in

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this case is whether the appointment of a receiver by the state court is of such a character as to confer rights which are to be protected under the rule already stated. During the interregnum between the dismissal of the case in this court, and its resumption by the order setting aside that dismissal, has anything occurred so that the rights of other persons need protection? They are such only in this case as grow out of the appointment of the receiver by the state court. It cannot be said that Nickerson has himself acquired any special rights or interests which are to be affected. It is only whether the state court should maintain its control over the property. Now, conceding that there might have been during this interval rights acquired by third parties which should be protected by this as well as all courts, what was the status of the case at the time that the receiver was appointed? If we concede that Nickerson might commence a suit in the state court for the appointment of a receiver to take possession of the property the same as was asked by the plaintiff in the original case in this court, when this court resumed control of the case, as it did by its order of the 24th of July setting aside the previous order of dismissal, then Nickerson and his counsel should have suspended all proceedings in the state court as to the appointment of a receiver. Whatever may be said as to the order of dismissal, the cause then stood precisely, as my brother judge has said, as though no order of dismissal had ever been made; and it presents, therefore, a case where there was, at the time that the order was made by the state court for a receiver, a bill pending in this court which also asked for a receiver of the same property, and of which this court had jurisdiction.

These conflicts, of course, are always unpleasant to us. We desire to proceed harmoniously with the state courts and state judges. We cannot, however, shrink from duties imposed upon us, where we have once obtained jurisdiction of a case, as we think we have here. We believe that it is our duty to maintain it, according to well-settled principles.

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And we trust that there may be no such conflict between the state and federal courts in this instance as has been intimated.

However this may be, we have to proceed according to our views of law and equity in the case. We would hope that there will be no controversy about the person to be appointed receiver. If the plaintiff can suggest some name, and the counsel on the other side have no objection, we shall appoint him. But if they object, we may appoint one of our own motion.

HENRY W. FULLER *et al.* vs. ENOCH S. YENTZER *et al.*—SAME vs. SAME.—SAME vs. HERMAN B. GOODRICH.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—OCTOBER, 1874.

IN EQUITY.

BUCK CREASERS.

1. FULLER'S INVENTION.—He did not invent the notch and blade, nor the springs: he only invented their application to the sewing machine. Nor can he claim the power of the needle-bar in its various applications, but only the special mechanism which he devised in its application to the sewing machine.

2. PROTECTION TO PATENTEE.—A patentee should be protected from any subsequent device which comes fairly within the principle of his invention, but an invention should not be extended beyond the legitimate bounds of the discovery, so as to exclude other inventions within the same field of operations.

3. DIFFERENT DEVICE.—The fact that patentee's device forms a crease

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by the notch and blade and pincers, does not prevent others from forming a crease by some other device.

4. YENTZER AND SCATES PATENT.—If there is a substantial difference between their device and that of the Fuller and Rose patents, there is no infringement.

5. UNITY OF ADJUSTMENT.—The Rose patent does not cover every form of mechanism by which a creaser is adjusted to a sewing machine; but must be limited to the mechanism particularly described.

6. The first and second claims of the Rose patent are substantially the same: one describes the device, the other the method.

7. GOODRICH PATENT.—His combination of lever and spring with the tuck-marker is substantially different from any patented by Rose, and not an infringement.

8. RESTRICTING CLAIM.—Patentees should be limited to the claims of their patents, descriptions and particular mechanisms and devices.

9. Novelty of defendant's patent not discussed.

S. S. Fisher, C. C. Bonney and E. B. Barnum, for complainants.

Scates & Whitney, for defendants.

DRUMMOND, J.—These three cases were argued upon the motion for a preliminary injunction, and I then declined to issue the injunction. They afterwards went to proofs and were argued upon final hearing, and having given them full consideration, I remain substantially of the same opinion as when the motion for an injunction was argued, having come to the conclusion that the plaintiffs are not entitled to the relief they ask. The cases are by no means free from difficulty, but I will state the reasons why I have come to this conclusion.

I have no doubt of the validity of the two patents under which the plaintiffs claim; the first, the patent of Fuller, issued in 1860, and the other, is called the Rose patent, issued in September, 1863, and re-issued in December, 1868, and of which Fuller is the assignee. The original patent of Fuller, so far as it is material to consider it in connection with the questions involved in this case, was for a device for creasing and tucking cloth by means of a notch and blade.

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The original device of Fuller was constructed in such a way as to be attached to the bed-plate of the sewing machine, and the special device by which the creasing was performed was operated by means of the needle-bar. The notch might be above or below. The result was, of course, substantially the same, and it could be arranged in front of the needle or behind it, according to the function that it was required to perform.

The first question to be determined is: What is the extent of the invention of Fuller? He did not invent the notch and blade: that was an old device; nor springs: they also were old.

All that he invented was the application of the notch and blade, the springs, and the various other parts of the mechanism to the sewing machine. He certainly could not claim the power of the needle-bar in all its various applications.

All that he could claim, and, I think, all that his patent, properly construed, can be considered to cover, is the particular device which he adapted in its application to the bed-plate of the sewing machine and to the needle-bar. Otherwise we would have to hold that wherever springs or the notch and blade were applied to the needle-bar, or any other old appliance was taken, by which the power of the needle-bar was used in the construction and operation of a creaser, his device would cover it. That, certainly, cannot be the proper construction of his invention. It is only the special mechanism which he has devised, in its application to the needle-bar and the other parts of the sewing machine, by which the result was obtained. The difficulty arises in the application of the invention. It is natural always, where inventors have discovered some special device or mechanism by which a useful result is obtained, and in the progress of the art various modifications are made, or new ones are invented, which produce the same result in greater or less perfection, to attempt to bring all subsequent discoveries within the scope of their device. It is perfectly right, where any

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device is subsequently used which may be said fairly to come within the principle of the original invention, that the party should be protected, but it would be wrong to stretch an invention beyond the legitimate bounds of the discovery, so as to exclude all other inventions within the same field of operations. For instance, in this case, it would be obviously an unsound doctrine to hold that no one else could take the notch and blade, or springs, in whatsoever form they might be used, and apply them to the bed-plate and to the needle-bar of a sewing machine.

Wherever any other person subsequently takes what may be substantially the same device or the same mechanism, and attempts to apply it to the needle-bar and to a bed-plate of a sewing machine, he may be said to be within the invention which Fuller first gave to the world.

As I understand the views of the plaintiffs, there is an effort in this case to bring within the scope of Fuller's device what is not legitimately within the true boundaries of that discovery, because we have to adopt substantially that rule in order to sustain the view of plaintiff's counsel, and to say that no one else could take the springs or apply the power of the needle-bar, or attach a form of notch and blade for creasing to the bed-plate without infringing Fuller's device.

So in relation to the Rose patent, of which Fuller is the assignee, and the validity of which, of course, he cannot question, and the value of which is not controverted.

It is admitted that Fuller's invention does not bring within its scope all forms of tuck-creasers when applied to the needle-bar and to the bed-plate of the sewing machine; otherwise Rose's invention must fall. But the ground upon which that can stand is, that it is substantially a different device. In Fuller's mechanism the act of creasing is performed as has been stated, and a model of which is before me. Under the Rose patent, and by the mechanism which he devised for creasing, there is a different arrangement of the various parts. There is no notch and blade as in the Fuller patent, but

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there are springs. The Rose device is attached to the bed-plate of the sewing machine. It is operated by the power of the needle-bar. There is a spring attached to a staff, and another, which together form the jaws which pinch the cloth as it passes through the sewing machine. A special contrivance presses the upper spring, brings the jaws together and the movement of the needle-bar down places the jaws upon the cloth which passes between them and an attachment of the bed-plate. It makes a crease upon the cloth; and it is said to have an advantage over Fuller's device, in that it does not perforate or destroy, or even impair, the texture of the cloth. Now the same principle I think, must be considered applicable to the device of Rose as to that of Fuller, namely: he must be confined to the special mechanism which he has invented and which he attaches to the sewing machine, and by means of which he performs a crease in the cloth, and thus enables the operator to make the tuck.

It will be observed that Rose attached his device to the bed-plate of the sewing machine, and operated it by means of the needle-bar as Fuller had done; and there was nothing in Fuller's to prevent the operation of the Rose device.

Now that being so, it simply becomes a question, when one uses any particular form of mechanism, whether or not, so far as these two patents are concerned, it comes within either of them. The theory is to bring all other forms of mechanism by which a crease is made and a tuck formed, within these two inventions of Fuller and Rose; and it is said these have been so far the only two known methods of forming the crease. Everything that is legitimately within them of course, includes the invention of these two patentees; but it cannot be said that because they form the crease by the notch and blade, and by the pincers, that no one else can form a crease by some other device different from that of Fuller or Rose; in other words, that they have patented a result or an effect, and not the particular form of mechanism which they have set forth in their specifications. If this is the true con-

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struction of these patents, then we shall not have so much difficulty in determining whether or not the defendants have infringed the two devices invented by Fuller and Rose.

To take the first case. The ground assumed by the plaintiffs is that the tuck creasers manufactured by Yentzer and Scates, infringe the first claim of Fuller.

The first claim of Fuller is: "The forming of one, two or more creases in cloth by means of markers on opposite sides of the cloth, which markers are the notch and blade or the notch and point, one connected with the bed of the machine, and the other operated simultaneously with the vibrations of the needle-bar in a sewing machine."

As I have said the notch and blade are old: the springs are old. It may be true—it is not necessary to controvert it in this case—that Fuller was the first person to apply the notch and blade and the springs to a sewing machine so as to form a crease, but I think that no one can take something old and apply it in a new way or in a new form so as to produce a particular result, and be protected beyond the particular way or form or device, and the application which he has made. Otherwise, as I have already said, any one could take an old device and make a new application of it, and prevent all other persons from taking the same, and making another and different application by which a like result is brought about. The question is whether Yentzer and Scates have done that. Let us look at one form of the Yentzer device and a tucker which they have manufactured. There is the spring and the power of the needle-bar applied to the spring. There is—if you choose to call it so—the notch and blade attached to the bed-plate. But the question is whether the springs and notch and blade are used in the same way as in the Fuller patent. Fuller covers by his own special mechanism anything that is fairly within it. He does not include other and different devices or mechanism by which the same result is reached; and I think there may be fairly said to be a difference—such a difference as does not bring it within the mechanism of Ful-

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ler; and so it may be said of other forms of manufacture by Yentzer and Scates.

In the second suit, which is also against Yentzer and Scates, the ground assumed by the plaintiffs is, that the creasers manufactured by them, infringe the 6th claim of the Rose patent, which refers to what is called the "unity of adjustment."

The claim is for "a tuck-creasing mechanism such as described, having its upper and lower parts connected and together adjustable as to its relation to the needle of the sewing machine and operated by the sewing machine substantially as set forth."

If the view of the plaintiff's counsel as to the construction of the Rose patent is correct, then all these various devices would be infringements of that claim. If, in other words, Rose has patented every form of mechanism by which a creaser is attached or adjusted to the sewing machine, and by which unity of adjustment is brought about, then there could be no question but the defendants have all infringed, but I think that the view of the counsel of the extent of this claim is not correct. I think the claim is narrower.

It is insisted on the part of the plaintiffs that this patent cannot be restricted to a unity of adjustment in a tucker of the mechanism such as described in the Rose specifications. I think it is so restricted. Let us see. It is said that in the claim the words are used "a tuck-creasing mechanism" and that it means, therefore any tuck-creasing mechanism. "A tuck-creasing mechanism having its upper and lower parts connected and together adjustable." If that were the claim, and it could stand as the invention of Rose, then it might be the defendants would all infringe: but that is not the claim. It is qualified; it does not mean every kind of tuck-creasing mechanism having its upper and lower parts connected and together adjustable, but any tuck-creasing mechanism substantially such as described, which words are very important and essentially qualify the preceding words. It must therefore mean the kind of mechanism—mechanism such as here de-

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scribed, not any form of mechanism however different it might be, but this particular form of mechanism, or that which is substantially the same.

We cannot strike out material words from the claim itself and enlarge the meaning of the invention, but we must limit it fairly, I admit, within the language of the claim.

The third suit is by Fuller as the assignee of the Rose patent and against Goodrich, and it is alleged that Goodrich infringes the first, second, fifth, sixth and eighth claims in the Rose patent.

There seems to be in forming the claims under the Rose patent a disposition to expand them unnecessarily. For instance, the first and second claims are substantially the same; one, to be sure, speaks of the mechanism by which the crease is formed, and the other of the method of pinching the fabrics by which the crease is formed, but of course they resolve themselves into substantially the same thing. The claim is: "The mechanism substantially as herein described for forming a ridge or ridges on fabrics to be afterwards folded in the line of such ridges."

The second claim is the method of nipping or pinching the fabrics to form ridges or creases thereon, by means of jaws opened and closed at intervals to seize and pinch the fabric when at rest, and then release it as the same is moved along by the feed in the sewing machine. But still it means the method produced or seen in the form of mechanism which is referred to in the first claim, and the only difference, therefore, between the first and second claim is, the one speaks of the device as the mechanism, and the other the method by which that mechanism produces the crease.

The fifth claim is the combination of the creasing device or devices of the tuck-marker with the jointed lever substantially as and for the purposes set forth.

The sixth claim I have already referred to and considered.

The eighth claim is the combination of the lever and spring with the tuck-marker, having upper and under parts con-

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nected and together adjustable as specified, substantially and for the purposes set forth. Now it is claimed on the part of the plaintiffs that this form of device used by Goodrich is an infringement, because it is said it is substantially the device of Rose, and that the crease is formed in substantially the same way, and that the parts are adjustable in the same manner; that is to say, that the mechanism of the parts is the same, because, as I have said, I consider that an indispensable element in the true construction of the Rose patent. I do not so regard it. Limiting the Rose patent to the substantial form of mechanism which he has described and the manner in which it operates and is attached to the bed-plate of the sewing machine and the needle-bar, I think there is a substantial difference, such a difference between these two devices as is within the true construction of the patent law, and to hold otherwise is to leave subsequent inventors within very narrow bounds in the same common field of discovery and would, therefore, be attended with very serious consequences. If in any part of the mechanism of Fuller or of Rose there was some great, novel principle or discovery, which no one else could use without infringing that part, then it might be said that these cases of the defendants were fairly within its operation, but that would bring it within the principle, for example, of Howe's discovery in relation to the operation of the needle, and of Wilson's feeding device. There is something connected with Howe's discovery which no one else can use without our saying at once that, no matter in how different a form we put it, still Howe's invention is there. So in relation to the feeding device of Wilson. No matter how much you may change it or modify it, still it is Wilson's feeding device. If that principle were applicable to these cases, then I should have no hesitation in holding there was an infringement.

There are two modes of construing the patent law, and it may be said, perhaps, without any disrespect, that there are some judges who adopt one mode and some another. There

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are those who are inclined to expand, beyond legitimate boundaries, the invention of the patentee. There are others who restrict it within narrower bounds, holding that the invention of the patentee must be limited by the particular mechanism and the application by which the result is attained, thus leaving the field of discovery open to all persons to explore it beyond the range of that particular mechanism and its application. I confess the latter seems to me the more correct rule and therefore hold that parties should be limited rather closely within the claims of their patents and the description of the particular mechanism, and the application which they have made by which the result is produced. Of course a change of form will not change the principle. And I do not dispute the rule that the invention is to be construed liberally.

A mechanical change does not prevent an infringement. In looking at Goodrich's device as I have said, it seems to me to be essentially different from the Rose patent, and therefore I hold that in that case, as in the others, there is no infringement. In these cases all the defendants, or Yentzer and Goodrich under whom these defendants are manufacturing, claim to be protected by patents duly issued. Of course if those patents are for something which has been previously discovered and patented to other parties, the patent is no protection, but it is at least evidence of the view which the patent office has taken of the rights of the defendants.

The application for the injunction is therefore refused and the bills dismissed.

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In re JACOB FROST.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—OCTOBER,
1874.

IN BANKRUPTCY.

In determining whether the requisite number of creditors have joined in a petition under the amendment of June 22, 1874, only those are to be counted whose debts are unconditionally provable. Those claiming liens or holding security cannot be reckoned.

McClellan & Hodges, for petitioning creditors.

Grant & Swift, for respondent.

BLODGETT, J.—The petition in this case was filed by eight of the creditors of respondent, the aggregate of whose debts amount to \$8,944. To this respondent filed an answer, duly verified, stating, in substance, that the requisite number of his creditors had not joined in said petition, and with his said answer filed what purported to be a schedule or list of his creditors with the amount due each, to which some amendments were afterward made. The petitioning creditors having suggested, by way of reply to this denial, that the list or creditors so filed by the debtor was in many respects untrue, both as to the nature and amount of his debts, a reference was made to H. N. Hibbard, Esq., one of the registers of the court, to take proof and report as to the correctness of said list, and the number and amount of the provable debts against said respondent.

The register has filed his report, to which no exception is taken, from which it appears that the total number of credi-

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tors to whom the respondent is indebted in sums over \$250 each, is twenty-six, the aggregate of whose debts amounts to \$48,141 excluding the demands against him for state, county and municipal taxes now due and unpaid for the past year. Of the creditors thus enumerated, four, the aggregate of whose debts amounts to \$22,200, are secured by mortgages, which so far are in no way impeached or attacked by these proceedings. One of the creditors named in said bill had obtained a judgment for the amount of his debt \$843, in due course of legal procedure, before the petition was filed, for which he claims a lien on lands owned by debtor, and since the petition was filed seven creditors, the aggregate of whose debts amounts to \$9,120, have entered up judgments, upon warrants of attorney, against the respondent in the state courts of this county, where respondent resides and owns real estate, so that if these proceedings are defeated, said judgments will become a lien upon the property of the respondent and give said judgment creditors a preference over the remainder of respondent's creditors. This leaves fourteen creditors whose debts exceed \$250 each and the aggregate of whose debts amounts to \$14,782, who have no security and have taken no steps which may ripen into security or priority. There are in addition to these creditors twelve persons named in the list whose claims amount to less than \$250 each, and the aggregate of whose claims is \$1,150.

Do these facts show that the requisite number of the creditors of respondent have joined in this petition?

By the amendment of the 22d of June last, to the general bankrupt law, the petitioners must constitute one-fourth in number of the creditors of the debtor and the aggregate of their debts provable under the bankrupt law must amount to at least one-third of the debts provable against the estate of the debtor in bankruptcy. It is clear that if all the creditors of the debtor, secured and unsecured, are to be counted for the purpose of instituting proceedings under the law as it now stands the requisite quorum has not concurred in this peti-

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tion. The total number of creditors over \$250 each is twenty-six, and there are twelve holding smaller amounts, so that eight joining in this petition do not constitute a fourth of even the smaller number. The aggregate debts of the respondent amount to \$48,141, excluding taxes; and the aggregate represented by petitioners is only \$8,944, which is far short of one-third of the whole.

The question is, what is meant by the phrase "debts provable under this act," as used in the amended 39th section. If it is intended to describe all the creditors of a person, who under any circumstances may prove their debts against the estate of a debtor in bankruptcy, then this petition obviously falls far short of the requisite number, while if the four creditors, who hold security by mortgage for their debts and the one who has obtained a judgment in time to entitle him to a priority are to be excluded from the reckoning, then the petitioners constitute over a fourth in number, and the debts, \$8,944, are a third in amount of the aggregate of those remaining after deducting the four mortgage debts and one judgment debt.

As will be seen: Total debts.....	\$48,141
Mortgage debts.....	\$23,200
Judgment.....	843
	<hr/> 23,043
Balance unsecured.....	\$25,098
One-third of which is.....	8,366
Amount represented in petition.....	8,944
Total number of unsecured creditors.....	21
One-fourth of whom is.....	5¼

The amended act does not specifically define what is meant by the phrase, "debts provable under this act," and we are obliged to resort to the whole law as it now stands amended to ascertain its meaning.

The 19th section of the act of 1867 describes the various classes of creditors who are entitled to prove their debts.

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By this, all debts due at the time of adjudication or at a future day, all contingent as well as absolute liabilities and certain unliquidated claims for damages are provable against the bankrupt's estate; and after enumerating all the various classes of debts so provable, it declares that "no debts other than those above specified shall be proved or allowed against the estate."

The 20th section provides that "when a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt, after deducting the value of such property, to be ascertained by agreement between him and the assignee or by a sale thereof to be made in such manner as the court shall direct; or the creditor may release or convey his claim to the assignee upon such property and may be admitted to prove his whole debt. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the bankrupt's right of redemption on receiving such excess; or he may sell the property subject to the claim of the creditor thereon, and in either case the assignee and creditor respectively shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not so sold or released and delivered up, the creditor shall not be allowed to prove any part of his debt."

By the 21st section, it is provided: "That no creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt; and all proceedings already commenced or unsatisfied judgments already obtained thereon, shall be deemed to be discharged and surrendered thereby."

Other clauses might be quoted, but it seems to me those cited are sufficient to show that any creditor holding a secured claim or demand against the bankrupt, cannot prove his claim

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without first exhausting or surrendering his security. His secured debt may be in one sense provable, but only on conditions. And those conditions can only be performed after there is an assignee to whom the surrender of security can be made, or by a sale of the property as the court shall direct, both of which contingencies can only occur after the debtor is adjudged bankrupt, or at least after the court has taken jurisdiction of the subject matter. True, a secured or lien-holding creditor may be allowed to petition for adjudication against his debtor but only on condition of offering to surrender his security, while an unsecured creditor may proceed without any such condition to petition for adjudication and prove his debt.

It therefore seems evident to me that by the term "debts provable under act" Congress meant debts unconditionally provable without any release or other preliminary action, either by the court or assignee, being necessary. Any other construction would make it practically impossible to put a very large proportion of debtors into bankruptcy, as it would leave unsecured creditors entirely at the mercy of those who had, by their diligence or otherwise, obtained security. A case may be readily supposed where a debtor has given enough of his creditors security under such circumstances as to amount to a fraudulent preference, to break the statutory quorum of one-fourth in number and one-third in amount of all his debts, and thereby prevent proceedings in bankruptcy from ever being maintained. A debtor might fully secure three-fourths in number of his creditors holding two-thirds in amount of his debts in defiance of all the provisions of the bankrupt law for the prevention of fraud, and yet be secure from bankruptcy proceedings if secured creditors who, so far as known to the court, insist upon their security, are to be counted for the purpose of determining the requisite number of petitioning creditors.

As this petition, therefore, is signed by more than a fourth of the unsecured creditors of the debtor, whose claims in the aggregate amount to more than one-third of the debts uncon-

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ditionally provable against the respondent's estate in bankruptcy, I find upon the admitted facts in this case that the requisite number of creditors have joined in this petition.

I have not felt called upon to consider and determine the position occupied by those creditors who have entered judgment by confession since this petition was filed, as more than a fourth of the unsecured creditors, counting those judgment creditors as unsecured, have joined in this petition. The respondent is still at liberty to deny the acts of bankruptcy alleged in the petition, as this decision only determines that enough creditors have petitioned to put respondent on his defense upon the merits.

This opinion was approved in *In re Green Pond R R. Co.*, 13 B. R., 118.

Where a question is made as to whether a sufficient number of creditors have joined in an involuntary petition, the case may be referred to a register or commissioner to examine the proofs and report thereon. *In re Sargent*, 13 B. R., 144.

A corporation, however, may be proceeded against in bankruptcy by any one or more creditors, irrespective of the amount of their claims; the provision as to number and amount of creditors required to join in petitions against a natural person does not apply. *In re The Oregon Bulletin Publishing and Printing Co.* 13 B. R., 199.—[Reporter.

Chicago & N. W. R. R. Co. vs. Chicago & P. R. R. Co.

THE CHICAGO & NORTHWESTERN RAILROAD
COMPANY vs. THE CHICAGO AND PACIFIC
RAILROAD COMPANY.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—OCTOBER,
1874.

IN EQUITY.

RAILROAD CROSSING AT GRADE.

1. Where the state Legislature has not prescribed in what manner one railroad shall cross another, a court of equity has jurisdiction in a proper case, to control the matter.

2. In Illinois the policy of state legislation is to allow a new railroad, in most instances, to cross another road at grade; but if a new road can at small expense, cross the old one at a different level, a court of equity should require it to do so, especially if a grade crossing is dangerous to life and property.

3. The additional expense may, however, be apportioned between the roads, as in such case the old road has no vested absolute rights to control the new.

4. JURISDICTION.—A corporation created by the laws of another state, although associated with one of this state, and having common interest with it, is entitled to file a bill in this court and claim its protection.

This was a bill by complainant as a corporation of Wisconsin, for an injunction to prevent defendant's road crossing complainant's line at grade. The bill recited that at the proposed point of crossing, the complainant's grade was twenty-four feet to the mile, which grade was increased by the line there taking a sharp curve to the north, through a deep cut, about one thousand feet in length, that would completely shut out from view trains approaching from the west on either line, were the crossing made at this point.

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These statements were sustained by affidavits of civil and locomotive engineers familiar with the line and location, and by plats and profiles showing the proposed crossing and grades. It was also shown that were the proposed crossing made, and all trains required to stop on that grade, locomotive engines could not start and carry over the grade as heavy trains by at least five loaded cars as they now can, and that in certain conditions of the track, it would be impossible to stop heavily loaded trains coming down the grade between two hundred and eight hundred feet of the crossing as required by law,¹ thereby incurring great danger of collisions.

The bill further alleged that a route for an elevated crossing, where the Pacific railroad could pass over the Northwestern by bridge, had been surveyed by the engineers of both roads and was only some five hundred feet distant from the proposed point of crossing, and would cost only about \$13,000 more to construct than the proposed route; that this route was perfectly safe and feasible, and is the one that ought to be adopted; that the proposed route would make a crossing that would always be exceedingly dangerous and difficult, and materially lessen the capacity of the whole line from Chicago to Freeport, and materially impair its usefulness.

B. C. Cook and George C. Campbell, for complainant.

This being a controversy "as to the point and manner of crossing," this court has jurisdiction under the consolidated railroad act of 1871-2. Revised Statutes, 1874, chapter 114.

The eminent domain act applies only to the taking of private property; and the right of way of a railroad company is taken and held for public use. *Matter of Boston & Albany Railroad Company*, 53 New York, 574.

Even if the eminent domain act could be invoked, it would only apply to the compensation to be paid, whereas the controversy here is of an entirely different character.

¹ Illinois R. S., 1874, p. 809, Chap. 114, § 50.

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Section 10 of defendant's charter provides that "the said railroad shall restore the railroad thus intersected or crossed to its former state, or in a sufficient manner not materially to impair its usefulness;" and, as this is impossible in this case, the complainant has no right to make the crossing as proposed. *Chicago, Burlington & Quincy Railroad Company vs. Payne*, 59 Illinois, 534.

B. F. Ayer and John S. Wilcox, for defendant.

The complainant is a consolidated corporation, a portion chartered by the state of Wisconsin, and the remainder by the state of Illinois, and being thus a citizen of both states, this court has no jurisdiction. *Bank of the United States vs. Deveaux*, 5 Cranch, 61; *Louisville &c. Railroad vs. Tetson*, 2 Howard, 497; *Marshall vs. Baltimore & Ohio Railroad*, 16 do., 314; *Ohio & Mississippi Railroad vs. Wheeler*, 1 Black, 286; *Baltimore & Ohio Railroad vs. Harris*, 12 Wallace 65; *Chicago & Northwestern Railway vs. Whitton*, 13 do., 270.

Section 10 of defendant's charter authorizes it to cross the line of any other road, and proceedings having been commenced under the eminent domain act, Revised Statutes, 1874, chapter 47, in the Circuit Court of Kane county, that court has exclusive jurisdiction.

DRUMMOND, J.—The question involved in this case is one of great importance, both as to the rights of railroads and those of the public. I am inclined to think that, under certain circumstances, an application may be made to a court of equity for the purpose of controlling, to some extent, the right of one railroad to cross another. If the legislature of the state has prescribed in what manner one railroad shall cross another, it may be that it would control all parties and the courts; but where the legislature has not declared in what particular way one railroad shall cross or intersect another, but has only referred to it in general terms, then, I think, within the true meaning of the act of the legislature, it may be competent for

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a court of equity to control the railroads as to the crossings. In this state, it may be said, in one sense, to be the policy of the state to allow a new railroad to cross the track of an old railroad, and at grade, in most instances. At the same time, the legislature has shown clearly enough that it does not intend that a railroad shall cross at grade in all instances, otherwise it would have been so stated. For the reason that I mentioned before, it is not likely the legislature ever will say so, because the topography of the particular locality where the crossing is to be made—indeed, various circumstances—control and determine how the crossing shall be made. For example, where two railroads are approaching each other, through a comparatively level country, and one is to cross the other, it may be said that, in such a case as that, ordinarily, the new railroad would have the right to cross the other at grade; not that it is universally true, but generally so. There might be, and often are, circumstances where it would not be consistent with the interests of the railroads themselves or of the public that they should cross at grade.

Now in this case, assuming that the facts are as stated, and that the new railroad (the Chicago & Pacific Railroad) can cross over the old railroad at so little expense as is stated, I should consider it the duty of a court of equity to require it to be done. If the old road comes into a court of equity and asks that the crossing should be so made, and there is an additional expense incurred in consequence, it may be competent for a court to say the expense shall not be wholly incurred by the new railroad company, because I adhere to the doctrine I laid down the other day in the Michigan Central and Baltimore & Ohio case, that the fact that one railroad has been constructed does not give it any absolute rights, except so far as the question of mere property is concerned, over a new railroad. It takes its rights always subject to the power of the state to authorize any other railroad to cross or intersect it, as the case may be. Where there is a considerable expense growing out of the crossing, it may be a question for a court

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of equity to determine how that expense shall be apportioned.

In this particular case, assuming that the allegations of the bill are sustained by the affidavits, then it seems clear that it is for the interests of both roads that one should cross over the other. It is not a question for a day, a month, or a year; but it is a question for all time, so to speak, at any rate, for an indefinite time. The crossing of a road at grade involves a continual, never-ending expense and damage to both roads. It can be avoided by one crossing over the other, and the only expense then is the interest on the additional cost.

Now, in this case, it is said that there is quite a steep grade; that one of the circumstances connected with the crossing at grade, namely, the stoppage of the trains, involves a peculiar loss and danger. In such a case as that, it certainly may be competent for a court of equity to interfere, under the provisions of law as they now exist. The mere question of damages to be ascertained by the exercise of the right of eminent domain does not reach the difficulty; therefore it may be a proper case for the interposition of a court of equity, even though the court, under other circumstances, would not interfere, as in the case supposed, of two railroads in a level country, where they approach under such circumstances that the natural crossing may be at grade. Here it is not so.

If there is any additional expense involved in this to the new road, I do not say that expenditure would have to be incurred exclusively by that road. I should be very much inclined to apportion the expense under the circumstances of the case, because the old railroad comes in and asks for the interposition of a court of equity, and under the equity rule, might be required to bear its proper share of the expense, because the crossing at the elevation is for the common advantage of both roads.

I think this a proper case for the interposition of a court of equity.

I am more and more inclined to hold that it is the duty of a court of equity to interfere in cases of this kind unless the

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legislature has unmistakably declared what the rule is. If the legislature comes in and says all crossings shall be located in a particular way, as a police matter, we will submit. But so long as they have left it open, I am inclined to hold that a court of equity can protect and assert the rights of railroads—the old and the new—and those of the public.

As to the question of jurisdiction, it is perhaps not entirely free from doubt. But I think that for the purpose of a standing in the federal court, within the language of the Constitution and the judiciary act, we must hold that a corporation created by the laws of another state, although it may be associated with a corporation in our own state, and their interests may be common, will be recognized as being within the jurisdiction of this court; that a court of equity can protect the interests of a joint proprietor in property that is being injuriously affected. That is my present impression.

Let the injunction issue pursuant to the prayer of the bill.

TURNBULL *et al.* vs. THE WEIR PLOW COMPANY.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—OCTOBER, 1874.

1. OBJECT OF THE RECORDING ACT.—The object of the 11th section of the act of Congress of 1836, requiring assignments of interests in patents to be recorded within three months, being for the protection of *bona fide* purchasers without notice of previous assignments, a conveyance by a patentee of a right under the patent is valid, as between the parties, without being recorded.

2. SUBSEQUENT ASSIGNMENT OPERATIVE ON RESIDUARY INTEREST.—Where a patentee conveys all his right, title, and interest in the patent in a particular territory, and has previously parted with some interest under the patent in a portion of the same territory, the second assignment will be held to operate only upon the residuary interest of the patentee, after having made the previous assignment, even though the first assignment be not recorded until after the second.

3. CONSTRUCTION OF SECOND CONVEYANCE.—Where the patentee has any remaining interest in the patent upon which a second assignment can be said fairly to operate, and the second assignment purports to convey only his existing interest, it will not be construed as showing an intention on the part of the assignor to convey what he had previously conveyed.

4. THE CASE STATED.—Complainants, in a bill to enjoin the infringement of a patent and for an account, claim title under assignments from the patentee, executed in 1860, of the right under the patent for the counties of Warren and Henderson in Illinois. Defendant claims under an assignment from the patentee, executed in 1870, of all his right, title and interest in the patent in certain territory, including Illinois, which assignment was first recorded. *Held*, that the first assignment is operative, though not recorded until after the second, and that a plea to the bill setting up the second assignment in bar of complainant's right of action should be overruled.

5. RECORDING ACT OF 1870 CONSTRUED.—The provisions of the 86th section of the act of Congress of 1870, with regard to the recording of assignments of patents, are substantially identical with those of the 11th section of the act of 1836, as construed by the courts.

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This was a bill for an injunction to restrain the infringement of a patent for an improvement in cultivators, and for an account. Defendant filed a plea to a portion of the bill, and an answer to the residue. The plea was set down for hearing. The contents of the bill and of the plea are sufficiently stated in the opinion.

William Marshall, James L. High and R. Mason, for complainants.

1. The true construction of the 11th section of the act of 1836, requiring assignments of patents to be recorded within three months, is that the statute is not mandatory, but merely directory and for the protection of innocent purchasers without notice. *Pitts vs. Whitman*, 2 Story, 609; *Brooks vs. Byam*, id., 542; *Continental Windmill Co. vs. Empire Windmill Co.*, 4 Fishers Patent Cases, 428. If, therefore, the assignment to the subsequent purchaser purports to convey only a limited or special interest in the patent, as the assignment to Weir in this case, being in the nature of a quit-claim, it is itself notice to the assignee of all previous grants, against which he cannot protect himself by a prior record of his assignment. In other words, the patentee by his second grant conveys only the residuum of title, or residuary interest remaining in him after his prior grant, and the first assignment, though not recorded, will prevail as against the second. *Ashcroft vs. Walworth*, 5 Fishers Patent Cases, 528. The assignee of a patent can claim no more title than his assignor could lawfully grant, and takes subject to the legal consequences of the patentee's previous acts. *Pierson vs. Eagle Screw Co.*, 3 Story Reports, 403; *McClurg vs. Kingsland*, 1 Howard, 202.

2. The same principle is to be applied here which governs in conveyances of real estate. The doctrine is well established, that a subsequent conveyance of real estate which does not purport to pass the entire fee, being limited in terms to such interest as grantor then has, operates only on his resid-

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uary title, after having given the former conveyance, even though the first conveyance be not recorded until after the second. *Brown vs. Jackson*, 3 Wheaton, 449; *Hope vs. Stone*, 10 Minnesota, 141; *Marshall vs. Roberts*, 18 Minnesota, 405; *McNear vs. McComber*, 18 Iowa, 12; *McConnel vs. Reid*, 4 Scammon, 117; *Butterfield vs. Smith*, 11 Illinois, 485; *Hamilton vs. Doolittle*, 37 Illinois, 473. A purchaser of real estate by quit-claim is not a *bona fide* purchaser without notice. *May vs. LeClaire*, 11 Wallace, 217.

3. The act of 1870 can have no application, since complainant's rights were acquired long before its passage. That act, not being retrospective in its terms, cannot affect conveyances of patents made before its passage.

West & Bond, for defendants.

1. The assignments made in 1860, under which the complainants claim, were not recorded within three months as required by section 11, act of 1836, and hence are void as against Weir and his assigns, he being a subsequent *bona fide* purchaser and having duly recorded his assignment. The courts have held that under said section the assignment "must be recorded within the three months to defeat the right of a subsequent purchaser, without notice and for a valuable consideration. In order to guard against an outstanding title of over three months duration, the purchaser need only look to the records of the patent office." *Gibson vs. Cook*, 2 Blatchford, 144; *Brooks vs. Byam*, 2 Robb, 161; *Pitts vs. Whitman*, id., 189.

2. The common law distinctions made between warrantee and quit-claim deeds of real estate ought not to be applied to the construction of assignments of patents; because they have not been made under the common law, but under acts of Congress. (See sec. 11, act of 1836, sec. 36, act of 1870.) The act of 1836 provided that patents "shall be assignable by any instrument in writing." That of 1870 says, "by an instrument in writing." These acts make no distinction

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between different kinds of assignments, and do away with every formality. They must be in writing, and that is the only condition imposed.

3. The words "grant and convey," found in Weir's assignment, are not the usual words used in quit-claim deeds; they import more than mere words of quit-claim.

4. Under the acts of Congress, the decisions cited and the general practice, this assignment to Weir ought to be held to convey, not simply the actual residuary interest of the patentee without regard to the records, but all the right, title, and interest which he had as shown by the records.

5. The act of July, 1870, section 36, expressly provides that assignments of patents shall be void as against a subsequent purchaser without notice, unless recorded within three months from the date thereof. This act applies to all assignments, whether executed before or after its passage. Weir's assignment was given and recorded after the passage of this act, and several months before complainant's assignments were recorded.

DRUMMOND, J.—The question in this case arises upon the plea of the defendant, from which, and from the bill of complaint, the following facts appear: A patent was issued to one McQuiston on the 18th of October, 1859, for an improvement in cultivators, and re-issued on the 16th of May, 1871. Both parties claim under this patent. The defendant claims under a conveyance from William S. Weir, who purchased from the patentee on the 18th of November, 1870, and the assignment of purchase was recorded on the 5th of December, 1870. The terms of this assignment were that the patentee granted and conveyed to William S. Weir, through whom the defendant claims, "all my right, title, and interest in and to the said letters patent in the following described territory," (within which we may concede, for the purposes of the case, was included the State of Illinois), "* * as fully and entirely as the same would have been held and enjoyed by me if this assignment had not been made."

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On the 17th and 26th of April, 1860, the patentee assigned to the parties through whom the plaintiffs claim, the exclusive right to make and to sell all machines and rights under the patent, in the territory comprising the counties of Warren and Henderson, in Illinois. These assignments were not recorded in the patent office at the time that Weir's assignment was recorded, and the question presented by defendant's plea is as to the effect of the assignment to Weir, recorded in December, 1870, as against the assignments through which plaintiffs claim, and which were not then recorded.

I think there can be no question but that, under the 11th section of the act of Congress of 1836, as between the parties, the assignment by the patentee of the right under the patent would be valid without recording. In other words, the recording did not give it effect as between them. The only object of the law, I think, in requiring the assignment to be recorded, was to protect *bona fide* purchasers without notice of prior assignment of a right under the patent. It is contended, on the part of the defendant, that as it has been the practice for many years for rights under a patent to be conveyed by an assignment, the language of which is, "all the right, title, and interest" of the patentee in the patent, it substantially amounts to a warranty on the part of the patentee that he conveys by such language all the right which he ever had under the patent, and therefore, that when this language was used in the assignment to Weir in October, 1859, it meant all the interest which the patent originally conveyed to the patentee within the territory named. Of course the controversy turns upon what is the true construction of this assignment. Without deciding what might be the effect of an assignment of all the right, title, and interest of the patentee in a particular county, where there was no residuary interest left in the patentee, I am of the opinion, notwithstanding this alleged uniform practice as to assignments, that the true construction of such an assignment is, that where there is a residuary interest left in the assignor under the patent, within

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the territory mentioned, it must be construed as only conveying that residuary interest. I mean, of course, where he has previously parted with some interest under the patent in a portion of the territory. For example, in this case, so far as we know from the history of the case and what is before us in the pleadings, the patentee had conveyed all his interest in the patent in Henderson and Warren counties in 1860, but he had left and had a right to convey all his remaining interest in the state of Illinois. And when he stated that he conveyed all the interest which he had under the patent in the state of Illinois, and that the assignment was to vest in the assignee all his right under the patent in the state of Illinois as fully and entirely as the same would have been held and enjoyed by him if the assignment had not been made, we must construe it as not indicating on his part an intention to convey what he had previously conveyed to other parties, viz.: his rights under the patent in the counties of Warren and Henderson. Otherwise we must infer that he was perpetrating a fraud on the assignee by the assignment of 1870.

The question is, what is the legal effect of the language used, or what did he mean? We have nothing to guide us except the language of the contract. Did he intend, and is it necessarily the legal construction of that contract from the language used, that he intended to convey, in November, 1870, what he had previously conveyed in April, 1860? If, as I have already intimated, there was nothing on which the conveyance of 1870 could operate, then a different question would arise. But the whole state of Illinois, except the counties of Henderson and Warren, was left, upon which the conveyance could take effect. And I think that, looking simply to the contract, notwithstanding the practice which is said to have grown up under the law as to the form of these assignments, we must hold that where there was anything upon which the assignment could be said fairly to operate, we cannot construe it as showing an intention on the part of the assignor to convey what he had previously conveyed.

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In other words, we will not infer from language such as this, and in the absence of any proof upon the subject, that the patentee intended a fraud upon his assignee.

This is the general rule as applicable to conveyances of real estate. The question always is, did the person intend to convey,—and is that the true meaning of the language used in the instrument,—the same property and the same rights that he had previously conveyed to other parties? If he did, and if that is the necessary construction of the language, then it may be fairly said that the recording law should operate upon it, as well in the case of the conveyance of lands, as the assignment of rights under a patent. But I think the result of the authorities as to the conveyance of real estate is, that where there has been a conveyance of property which is unrecorded, and there is a conveyance afterwards of the property which is recorded, and there is anything upon which the second conveyance can operate, where it purports to transfer simply his right and title, it does not cut off the prior unrecorded deed. Perhaps the authorities go further and hold, in the case of real estate—at least such seems to be the intimation of the Supreme Court of the United States—that a mere quit-claim of the right and title of the grantor will not, *per se*, operate as against a prior unrecorded deed, which purports to convey the property.

The act of 1836 declared that a patent should be assignable, either as to the whole interest or any undivided part thereof, by any instrument in writing; and that the assignment should be recorded in the patent office within three months from the execution thereof. Now the language of the 11th section of the act of 1836, as construed by the courts, is not essentially different from the language of the 36th section of the act of 1870. The courts have construed the assignment, where it was not recorded, to be void as against parties who held by the subsequent assignment purporting to transfer, when recorded and taken in good faith, and without notice of the prior assignment or conveyance. The language of the 36th

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section of the act of 1870 is, that "said assignment, grant, or conveyance shall be void as against any subsequent purchaser or mortgagee for a valuable consideration without notice, unless it is recorded in the patent office within three months from the date thereof." I do not understand that this language is substantially different from that of the 11th section of the act of 1836, as construed by the courts, so that I hold that we cannot construe the language of the assignment made in November, 1870, to Weir, under whom the defendant claims, as intending to convey the right and title under the patent within the counties of Warren and Henderson, which the patentee in 1860 had conveyed to another party, through whom the plaintiffs claim. The result therefore, is, that the assignment in 1860 is operative.

The plea of defendant is therefore overruled.

In re Williams & McPheeters.

In re WILLIAMS & MCPHEETERS.

CIRCUIT COURT.—WESTERN DISTRICT OF WISCONSIN.—NOVEMBER, 1874.

IN BANKRUPTCY.

1. AMENDMENT OF JUNE 22, 1874, RETROACTIVE.—An amendment of a petition in bankruptcy to bring it within the amendment of June 22, 1874, is retroactive, and gives effect to action of the court taken on the original petition.

2. The amendment took effect on the beginning of the day it was approved, and operates upon a petition filed during the day.

3. CONSTRUCTION.—The amendment should be reasonably construed, if possible, so as not to destroy or impair any proceedings already commenced, or commenced in good faith in ignorance of its passage.

4. Irregularities in the bankruptcy proceedings do not deprive the court of its jurisdiction over the bankrupts and their estate, nor justify creditors in proceeding in the state courts.

5. JURISDICTION.—A statement in the declaration filed in the state court, of facts which would, if true, prevent the discharge of the debt in bankruptcy is not binding upon the bankrupt court, nor does it prevent the full jurisdiction of that court over the person and estate of the bankrupt.

On the 22d of June, 1874, Williams & McPheeters were partners in business in the Western District of Wisconsin, and on that day a petition in bankruptcy was filed against them in the District Court of the United States for that district.

On the 29th of June they were adjudged bankrupts by their own consent. The usual proceedings took place under this petition in bankruptcy. There was a meeting of creditors and an appointment of an assignee, who entered upon the duties of his office, and afterwards, under the direction of the

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district court, made sale of property belonging to the bankrupt estate, which sale was duly confirmed by the district court.

After these proceedings in bankruptcy were commenced, one Ellis brought an action in the Circuit Court of Dane county, in the Western District of Wisconsin, against the bankrupts, and Williams was arrested upon process issued out of that court. Thereupon he applied to the district court by petition, setting forth the facts and asking that Ellis be restrained from prosecuting the action, and for such other relief as should be just.

The district court issued a rule to show cause why Williams should not have the relief he prayed for; and upon the return of the rule, argument was heard, and the court stayed the action in the state court until the bankrupt court should determine upon the question of the discharge of the bankrupts, and the court directed that Ellis, upon service of a copy of the order of the court upon him or his attorneys, should discharge Williams, and cancel and surrender a bail bond which he had given.

Lewis & Tenney, and Tenneys, Flower & Abercrombie,
for Ellis.

A. S. Sanborn and M. Culver, for respondents.

DRUMMOND, J.—It is this order, made by the district court, that this court is called upon to review as being erroneous, not only in general, but in detail, for the reason that the recent amendment to the bankrupt law was passed on the same day that the petition in bankruptcy was filed, and it declared that a petition in bankruptcy might be filed against a party by one-fourth in number of his creditors, and one-third in value of the debts provable under the law, and as confessedly their petition was not filed under the provisions of the amendment, and so was not filed by one-fourth in number, or one-

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third in value, it is claimed that the court had no jurisdiction of the case, and that all proceedings that took place in the bankrupt court were void. It is insisted that the bankrupt law took effect at the beginning of the day it was approved, namely, the 22d of June, and there being no fractions of a day, and that the amendment operated upon the petition which was filed on that day.

If we concede that this principle is correct, namely, that the law took effect at the earliest moment of the 22d of June, 1874, the question is whether all the proceedings connected with the petition in bankruptcy were void, and the court had no jurisdiction of the case.

Clearly, according to numerous decisions which have been made, as the amendment was retrospective as to pending cases where there had been no adjudication of bankruptcy on the 22d of June, the petition could be amended. Now in this case the petition was, in point of fact, subsequently amended with the consent of the court, and one-fourth in number and one-third in value became parties to the petition. And if this were indispensably necessary to give effect to the action of the district court, the question is, whether it was not competent for the court to permit this to be done, and when done whether it did not relate back to the commencement of the proceedings in bankruptcy and give effect to the action of the court. I think it did. But, independent of this, it is to be observed that here the decree in bankruptcy was rendered with the consent of the bankrupts, and there is great force in the view suggested, that there was merely an irregularity which the bankrupts might waive.

But, however this may be, I am not prepared to say that because of this irregularity the court was deprived of all jurisdiction over the bankrupts and their estate, and that therefore any creditors of the bankrupts could proceed against them in the state court and obtain preferences, and harass and arrest the bankrupts after a petition in bankruptcy was thus filed.

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It will be recollected that the recent amendment provides that in case one-fourth in number and one-third in value have not petitioned, other creditors may join in the petition on certain terms, thus recognizing the propriety of supplying defects in the petition.

The amendment to the law should be reasonably construed, and, if possible, so as not to destroy or even impair any proceedings which had been already commenced, or which might be commenced, in good faith and in ignorance of the passage of the amendment on the 22d of June.

It follows from what has been said that Ellis should not have commenced an action against the bankrupts in the state court after the proceedings in bankruptcy had been instituted; and that the bankrupt court, according to the terms of the bankrupt law, had control of the action of the state court, and had a right to protect the bankrupt from arrest. Perhaps the proper course would have been for the bankrupt court to issue a writ of *habeas corpus*, and, upon the hearing, to discharge the bankrupt from arrest. But the order accomplishes, substantially, the same result, so far as it directs a suspension of proceedings in the state court upon the action, and effects the discharge of the bankrupt from arrest.

What was the legal effect of the action of the district court by an order properly made on the application of the party arrested, was a question of law, and it should have been left I think, to the law to determine.

I should, perhaps, notice an objection taken to the jurisdiction of the district court upon the ground that the claim of Ellis, as set forth in his complaint in the state court, was one that was not affected by the bankrupt law; because it is said that, to secure the indebtedness which existed on the part of the bankrupts, a mortgage of chattels was given by one of the parties, and they wrongfully and fraudulently sold the property, and converted it to their own use.

This objection seems to proceed upon the theory that the complaint and facts stated therein bound the bankrupt court.

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This is not correct, though it is true that the bankrupt law declares that the proceedings in bankruptcy shall not affect debts of a certain character, and among others, those which have their origin in fraud, and from them the discharge of the bankrupt shall not operate as a release.

It is to be observed, however, that this is a question which the bankrupt court has the right to determine, and that a statement in a declaration or complaint made by a party in a state court does not bind the bankrupt court. Ellis had, therefore, no right to assume that, because of certain allegations contained in the complaint, the court in bankruptcy was deprived of control over the proceedings in the state court.

There seems to have been no determination of the question of fraud by the bankrupt court; and, in fact, the allegations are not so clear, even in the complaint, as to warrant that court in arriving at the conclusion that the debt was of such a character as to be excluded from the operation of the bankrupt law.

The order of the district court will be sustained.

Consult *Hamlin, Assignee, etc. vs. Pettibone*, ante p. 167. Also *In re Perkins*, ante p. 185.—[Reporter.

Chapman vs. Republic Life Ins. Co.

EMELINE L. CHAPMAN vs. THE REPUBLIC LIFE
INSURANCE CO.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—NO-
VEMBER, 1874.

1. INSURANCE—SUICIDE—INSANITY.—It is competent for an insurance company to restrict its liability by a clause avoiding liability "in case of the death of the insured by his or her own act or intention, whether sane or insane," and in such case no degree of insanity will avoid the condition.

2. INTENTION.—The words "act" and "intention" mean the same as the word "act" alone, for act implies intention.

This was an action at law upon a policy of insurance issued by the defendant, dated on the 23d day of July, 1873, whereby said company insured the life of Dennie Chapman in the sum of twenty-five hundred dollars, for the use and benefit of his wife, the plaintiff.

The declaration was in the usual form, and alleged that the said Dennie Chapman, after the issue of the said policy of insurance, and while the same remained in force, to wit., on the sixteenth day of September, in the year 1873, died, and that due notice and proofs of death were furnished to the defendant as required by said policy; and that the defendant, notwithstanding its said obligation and undertaking to pay said sum in the event of the death of the said Dennie Chapman, had refused and did still refuse so to do.

To this declaration the defendant pleaded among other pleas, that the said policy of insurance contained the following provision:

"In case of the death of the said insured, by his or her own

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act or intention, whether sane or insane, or of death in consequence of the violation of law * * * * * then and in such case it is stipulated by all the parties in interest that the company shall not be liable for the sum insured," and averred that the death of said Dennie Chapman, mentioned in the said declaration, was caused by his own act and intention; that said death was caused and produced by a pistol-shot fired by the said Chapman, into the head and face of him, the said Chapman, with the intention and for the purpose of then and there causing his own death.

To this plea the plaintiff replied in substance, that at the time when the said Dennie Chapman came to his death, as stated in the said plea, he was mentally insane, and in consequence and by reason of such mental insanity, was wholly incapable of exercising any intention in reference to the act which caused his death, and that said deed was wholly the result of his mental insanity, and that he was impelled thereto without any volition of his own by an insane impulse which his mental and physical faculties were unable to resist, and that from his mental insanity he was wholly unable to comprehend the natural character, effect and consequence, of the act which resulted in his death.

To this replication the plaintiff demurred.

Clarkson & Van Schaack, for plaintiff.

Bennett, Kretzinger & Veeder, for defendant.

BLDGERT, J.—It was contended on the part of the plaintiff that this case differed essentially from that of the *Bigelow vs. The Berkshire County Life Insurance Co.*, decided by this court in favor of the defendant several months since, in this: That the policy in that case provided that "if the assured should die by his own act, *sane or insane*" the policy should become void, while in this policy the provision is "in case of the death of the insured by his or her own act and intention,

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whether sane or insane," the policy shall become inoperative. And much stress is laid by the plaintiff upon the interpolation of the word "intention" into this policy, which was not in the policy in the Bigelow case.

To my mind, the use of the word "intention" in the policy before us, does not essentially vary or strengthen the legal meaning of the sentence from that of the policy in the Bigelow case. The word "act" necessarily implies intention, and it seems to me the policy in this case differs in no material import from the one already decided by this court; that is to say, you get just as strong a sentence, and it means practically just as much, to say that the company shall not be liable if the assured comes to his death by his own act, sane or insane, as if you say the company shall not be liable if the assured comes to his death by his own act and intention, sane or insane.

The real question in this case is, what was the clause in question intended to protect the insurance company against, and was it lawful for it to so attempt to protect itself?

The Supreme Court of the United States, in *Life Insurance Company vs. Terry*, 15 Wallace, 580, had construed the clause in a policy of life insurance, providing that the company should not be liable if the assured should die by his own hand, to mean, in effect, that if the insured, being in the possession of his ordinary reasoning faculties, should from anger, pride, jealousy, or a desire to escape the ills of life, intentionally take his own life, there would be no liability; but, when the reasoning faculties of the assured were so far impaired that he was not able to comprehend the moral character, the general nature, consequences and effect of the act he was about to commit, or when he was impelled thereto by an insane impulse which he had not the power to resist, such death was not within the clause, and the insurer was liable.

Evidently with a view to guard itself against the effect of this decision, the defendant has resorted to the clause in ques-

tion, avoiding its liability in cases of death by the hand of the assured, in cases where the suicide was committed while the insured was insane, as well as sane.

I have no doubt of the right of an insurance company to thus protect itself against liability. Certainly it is competent for an insurance company to say that it will not hold itself responsible for the acts of the insured when in a state of insanity; and the real question is, can the court, with such a contract as this before us, attempt to measure the degree of insanity?

It is agreed by this contract, that the defendant shall not be liable for the death of the assured, by his own act, when insane. The plaintiff, by his replication, admits that the assured came to his death by his own act when in a state of insanity, but claims that because the insanity was so extreme and complete as to entirely overthrow the moral and mental faculties, therefore the defendant remains liable. Will the court attempt to measure the degree of insanity under which the assured was laboring at the time he took his own life? It seems to me not. It is enough for the purposes of relieving the defendant from liability on this contract, that the assured took his own life as is admitted by the pleadings. The degree of insanity makes no difference.

There are but few adjudged cases bearing directly upon this question, the clause in this form being comparatively new. The one nearest in point is the case of *Pierce vs. Travelers' Insurance Company*, 34 Wisconsin, 389, where the language of the condition was that the company should not be liable if the assured died by a suicide, felonious or otherwise, sane or insane, and the court hold that the intention manifested by the words of the policy was so plain as to seem incapable of further explanation, and unless there was something in the policy of the law that forbids such a stipulation, the court had nothing to do but to give effect to the contract.

As the court in that case found nothing in the policy of the law forbidding such a stipulation, and as nothing is seen in

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this case or has been suggested, making it incompetent for the defendant to protect itself against the insane act of persons holding its policies, we think effect must be given to the condition, and the replication must be held to be bad.

Demurrer sustained.

To the same effect see *Knickerbocker Life Ins. Co. vs. Magdalena Peters*, 7 Chicago Legal News, 421. Where the provision in a policy was that it should be void "in case he (the insured) should die by his own hand, sane or insane," it was held that the words, "death by his own hand" had reference to the *criminal self-destruction*, and that the words "sane or insane" could have no further effect than to hold the policy void if the assured intended self-destruction while in a state of insanity, and not in case of death by accident. *De Gogorza vs. The Knickerbocker Life Ins. Co.*, 8 Albany Law Journal, 10. See also Bliss on Life Insurance, p. 393.—[Reporter.]

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THE TUG MAY AND THE TUG OCONTO.

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—NOVEMBER, 1874.

IN ADMIRALTY.

1. INFORMATION—SEIZURE ESSENTIAL TO JURISDICTION.—In cases of information an actual seizure of the *res*, prior to the filing of the libel, is essential to the jurisdiction of the federal courts.

2. UNITED STATES STATUTES AND DECISIONS OF THE SUPREME COURT COMMENTED UPON.

3. SEIZURE, WHO SHOULD MAKE.—The Secretary of the Treasury may authorize any United States officer to make the seizure; and in the absence of such authority, it is the duty of the customs officers.

These were two appeals from decrees of the district court, refusing to entertain jurisdiction of libels of information filed by the United States. The opinions of Judge Miller will be found in Vol. 5 of this Series, pp. 449, 460.

Levi Hubbell, United States District Attorney, for the United States.

Wm. P. Lynde, for claimants.

DEUMMOND, J.—These are appeals from the district court, and I have, after some hesitation, come to the conclusion that these proceedings were irregular, for the reason that the *res* was not in either case seized before the libel was filed. The objection taken to the jurisdiction of the court is technical, and my own judgment is opposed to sustaining it; but I think that the decisions of the Supreme Court have substantially held that there should be in such cases as this, before

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the libel is filed, a seizure made by the proper officer, and I will state why I have come to the conclusion that these decisions must control in these cases.

The act of 1789 gave exclusive jurisdiction to the district court in all cases of seizure.

The language is: "All seizures under laws of imposts, navigation or trade of the United States, where the seizures are made on waters which are navigable * * * within their respective districts as well as upon the high seas."¹

It will be observed it refers to all cases of seizure under the laws of navigation or trade, as well as of imposts.

The principle is stated, and the authorities cited in section 301 of Benedict's Admiralty, in which it is said that "an open, visible seizure by an officer of the government authorized by law to seize, must precede the commencement of judicial proceedings. The seizures are usually made by the revenue officers, or by the commanders of armed vessels on the high seas." The leading case upon the subject is *The Brig Ann*, 9 Cranch, 289.

In conformity with this view is the 22nd rule in admiralty adopted by the Supreme Court of the United States, in which it is said: "All informations and libels of information upon seizure for any breach of the revenue or navigation or other laws of the United States, shall state the place of seizure, whether it be on the land or on the high seas, or on navigable waters within the admiralty or maritime jurisdiction of the United States, and the district within which the property is brought, and where it then is."²

The theory upon which this doctrine is maintained is this, that it is the place of seizure that gives jurisdiction to the court. Where there is a forfeiture or liability to seizure for an offense against the laws of the United States, of course the *res* can be seized anywhere, as authorized by law, and may

¹ 1 U. S. Statutes at Large, 77.

² Benedict's Admiralty, p. 871.

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be brought within a district, and when it is thus seized, or is brought within a district, then the jurisdiction of the district court of that district is said to attach, and the libel must state that it is seized, and is there, in order that the court may judicially know that it has jurisdiction of the case.

And therefore it is, that this rule requires that the libel should state the place of seizure.

This seems to be the theory upon which these adjudications and this rule are made. On principle I confess I do not see any material distinction between cases of that sort and the ordinary cases of libels in admiralty by individuals, which are called cases of seizure, because the *res* is seized. But in all such cases the *res* is taken, not in the first instance, before the libel is filed, but after, and because the libel states a case in admiralty, the monition issues, and upon that monition the seizure takes place.

Now, it is not easy to comprehend why, in the one case as well as in the other, the seizure may not be made by the monition after the libel is filed. If the *res* is not taken, then the court has no jurisdiction of the case, and the proceedings must be dismissed. The only distinction is, that in the one case it is seized before, and in the other after the libel is filed.

And in either case, nothing could be done against the *res* by way of forfeiture or enforcement of a penalty or decree, unless there was an actual seizure. In the one instance the seizure is by the ordinary officers of the customs, and in the other, by the marshal of the court.

But, however this may be, whether the distinction is well founded in principle or not, it seems to be the rule adopted by the Supreme Court of the United States, and whatever view this court may entertain of the decisions, if such is the law as adjudicated by that court, we must follow it. And it must be confessed that this view is strengthened somewhat by the language of the first section of the act of Congress, of

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Feb. 28th, 1871.¹ That act consolidated all previous acts and amendments upon the subject of the regulation of vessels propelled in whole or in part by steam, from 1838 down to that time.

It is for a penalty for non-compliance with this act that these proceedings are instituted. And the first section of that act says: "And if any such vessel shall be navigated without complying with the terms of this act, the owner or owners shall forfeit and pay to the United States the sum of five hundred dollars for each offense, one-half for the use of the informer; and for which sum the steamboat, or the vessel so engaged, shall be liable, and may be seized and proceeded against by way of libel in any district court of the United States having jurisdiction of the offense."

There is some force in the argument derived from the peculiar collocation of this phraseology, the act of seizing being first mentioned, and then the proceedings by libel in the district court of the United States. Whether that is accidental or otherwise, is not apparent, but such is the language and the order in which it is stated.

It has been contended that this act does not provide for any special officers whose duty it is to make the seizure, and it is said that there is a controversy upon the subject, the marshal declining to make the seizure, and the officers of the customs doubting their authority.

The act of 1799 provided that the officers of the customs should "make seizure of and secure any ship, vessel, goods, wares or merchandise, which shall be liable to seizure by virtue of this or any other act of the United States respecting revenue, which is now or may hereafter be enacted, as well without as within their respective districts."² It is true that this section speaks of revenue alone, but it may be said that all laws connected with navigation are in a sense reve-

¹ 16 U. S. Statutes at Large, 440.

² 1 U. S. Statutes at Large, 678.

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nue laws. The terms are used sometimes indiscriminately.

The act of 1871 is a navigation law, and for the protection of lives and property, and is declared to be "for the better security of life on board of vessels propelled in whole or in part by steam, and for other purposes." It is clearly, then, a navigation law, and I understand it is so conceded by counsel.

I admit that there is nothing in the act of 1871 which prescribes it as a special duty upon any of the officers of the United States to make the seizures referred to in the first section, and it is only by analogy that we can hold that the officers of the customs are authorized to make the seizure under that act.

But, taking the whole scope of the decisions of the Supreme Court upon the subject, together with the 22nd rule, and the general tenor and effect of the act of 1871, I have no doubt that it is competent for the Secretary of the Treasury to authorize any officer of the United States to make the seizure; and that in the absence of any direction by him, it is the duty of the officers of the customs.

MR. LYNDE.—Has your honor considered the 30th section of the act of 1871, where it is made the duty of the officer of the customs to see that the act is enforced?

THE COURT.—I have not particularly, and I state this without reference to the 30th section of the act of 1871, which, possibly, may be broad enough to cover the case.

The forms in Benedict, to which the district attorney has referred the court, in several instances, seem to indicate that the filing of the libel precedes the seizure, and perhaps it is not an unfair inference from that circumstance that there may have been cases of that kind in the Southern District of New York, under similar laws to that of 1871.

But it does not seem that the question ever came up before the federal courts in the Southern District of New York, and we cannot, therefore, give those forms the effect of an adjudication. In the case of *The Steamship Fidelity*, 1 Sawyer, 154, the appeal in the circuit court was dismissed, for the rea-

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son that there was no allegation in the libel that there had been a seizure, and the circuit court held that that must appear, citing various authorities.

It does not distinctly appear, by the report of the case, what particular law was violated in that instance, but merely that it was a proceeding in admiralty to condemn the steamship Fidelity for violation of the laws of the United States.

MR. HUBBELL.—Condemnation follows fraud, and seizure a violation of the laws of navigation.

THE COURT.—One may be said to be a case of forfeiture, and the other a case simply of penalty, and to enforce the one or the other, seizure is the remedy, expressly so made by the act of 1871, and this court in the one instance decrees a forfeiture, and in the other that the *res* shall be sold to enforce the penalty. But I hardly think there is any just distinction growing out of that view of the case. I regret that I am obliged, in obedience to what I consider the decisions of the Supreme Court, to make the order which I shall have to make in these cases. And I would like, if the district attorney feels so inclined, that the Supreme Court should have an opportunity of re-considering its decisions upon this point. It may be that they can find a distinction between this case and the others which they have decided. I would hope it may so prove, because I think that there ought not to be so much distinction between the cases of seizure before and after the filing of the libel. But they have taken that distinction. These libels were dismissed in the court below.

The decrees of the court below may be affirmed, and the libels dismissed by the order of this court for want of jurisdiction.

That in cases of information an actual seizure of the *res*, prior to the filing of the libel, is essential to the jurisdiction of the court, and that such precedent seizure must be alleged in the libel, see *The Lovellen*, Vol. 4 of this Series, 158, 167; but in that case it was also held that the act of the owners in executing delivery bonds under the act of Congress, and thus

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regaining possession of the property, was a waiver of the objection of the want of a prior seizure.

The following are some of the decisions of the Supreme Court referred to in the above opinion :

In order to give jurisdiction *in rem*, there must have been a valid seizure of the *res* by the marshal. *Taylor vs. Carryl*, 20 Howard, 584, and the seizure must be actual, and not afterwards abandoned. *The Josefa Segunda*, 10 Wheaton, 312. As to what constitutes a seizure, consult also *Pelham vs. Rose*, 9 Wallace, 108.

The district court where the seizure is made has exclusive jurisdiction. *The Brig Little Ann*, 1 Paine, 40; *United States vs. The Betsey*, 4 Cranch, 452; *Keene vs. United States*, 5 do., 310; *The Merino*, 9 Wheaton, 402.

The law now provides (U. S. Revised Statutes, 1874, § 3072), "It shall be the duty of the several officers of the customs to seize and secure any vessel or merchandise which shall become liable to seizure by virtue of any law respecting the revenue, as well without as within their respective districts."
—[Reporter.

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In re C. W. REED.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—NOVEMBER, 1874.

IN BANKRUPTCY.

PROVING CLAIM—STATUTE OF LIMITATIONS.

1. *It seems*, that a debt barred by the statute of limitations of the state where the bankrupt resides cannot be proved in bankruptcy.

2. PROOF OF WAIVER.—Less strictness of proof is required to establish a promise by the debtor *before* the bar of the statute has attached, than to prove a new promise *after* the debt has become barred.

3. Interest will not be allowed where the debt depends upon the new promise.

This was a re-examination of the claim of J. Willard Fox, a creditor of said bankrupt, whose claim was disputed by the assignee.

A. S. Bradley, for the assignee, cited in support of the plea, *In re Kingsley*, 1 Bankruptcy Register, 66; *In re Harden*, id., 97; 1 *In re Cornwall*, 4 do., 134; *In re Cornwall*, 6 do., 305; Angell on Limitations, §247, note and cases therein referred to; *Wetzell vs. Bussard*, 11 Wheaton, 309; *Bell vs. Morrison*, 1 Peters, 351; *Ayer vs. Richards*, 12 Illinois, 146; *Dickerson vs. Sutton*, 40 Illinois, 403; *In re Anderson*, 9 Bankruptcy Register, 360.

McDaid, Wilson & Picher, for the creditor, cited against the plea, the opinion of Judge Blatchford in *In re James T. Ray*, Bankruptcy Register, Supplement, p. 44, and 1 Bankruptcy Register, 203, and also argued that the running of the statute was arrested by bankrupt's acknowledgment, and that a suit was brought by the creditor, the result of which is not

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shown by the evidence. That the acknowledgment was sufficient, counsel cited *Wooters vs. King*, 54 Illinois, 343.

BLODGETT, J.—I shall allow the defense of the state statute of limitations by the assignee, to the claim of a creditor seeking to prove his debt in bankruptcy wherever that defense might have been made in a suit in the state where the debtor resides. From an examination of the law, upon which there are, however, conflicting decisions, I consider the above conclusion to be supported by the weight of reason and authority, and shall adhere to this decision unless the law is otherwise settled by the appellate court.

As to the point of a new promise, I am of the opinion that the evidence in this case showed an acknowledgment by the debtor, before the five years had expired, which was sufficient to prevent the statute from running, and that acknowledgment before the bar might be sufficient, although it would not amount to a new promise after the debt was barred. I shall, therefore, allow the claim, without interest, however, as I do not consider it a proper case for the allowance of interest against the estate.

The statute of limitations ceases to run against the creditor of a bankrupt at the commencement of the proceedings in bankruptcy, and, if not barred at that time his claim, may be proved afterwards, though at the time of proof it would be otherwise barred. *In re M. Eldridge & Co.*, 12 National Bankruptcy Register, 540. A debt barred by the statute of limitations of the state in which the proceedings in bankruptcy are pending is not provable against the estate of the bankrupt, and cannot be reckoned in computing the number necessary to join in an involuntary petition. *In re Theodore Noeson*, post p.443.—[Reporter.

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In re MERCHANTS' INSURANCE COMPANY.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—DECEMBER, 1874.

IN BANKRUPTCY.

1. NOTICE OF FINAL MEETING OF CREDITORS.—A notice to creditors that a meeting would be held at a specified time and place for the purposes named in the 27th section of the Bankrupt Act, and that a final dividend would be declared, is a sufficient notice to authorize such meeting to make a final disposition of the estate.

2. ASSIGNEE'S ACCOUNTS.—Where the assignee's accounts and vouchers have been filed with the register, a reasonable time before such final meeting, the meeting may by vote properly dispense with the reading of them, and the exhibition of the vouchers, nor have individual creditors the right then to insist upon such reading or exhibition.

3. PARLIAMENTARY LAW.—In the absence of specific provisions of law on any point, creditors' meetings are properly guided by the rules and usages of parliamentary bodies.

4. ACTION OF CREDITORS' MEETING.—A creditors' meeting has no power over the accounts or fees of the assignee, but if the register submits them to such a meeting, their action will be regarded by the register and court, unless there exist grave reasons to the contrary.

5. EXTRA ALLOWANCE TO ASSIGNEE.—The register has no authority to allow an extra compensation to the assignee, even after a vote by the creditors' meeting. The proper practice is to apply to the court for such extra allowance previous to the final meeting.

W. H. Sisson, for objectors.

Bennett, Kretzinger & Veeder, for assignee.

BLODGETT, J.—At the request of *W. H. Sisson* and *J. N. Witherell*, H. N. Hibbard, Esq., one of the registers of this court, to whom this case is referred, has certified to the court

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twelve questions touching the powers and duties of the register in the conduct of creditors' meetings. I do not propose to answer these questions *seriatim*, as they all practically relate to a few points of practice stated in different phases, and several of the questions seem to be purely speculative, and no direct or categorical answer is deemed necessary for a solution of the points raised in the case.

On the first of October last, an order of court was duly entered on the application of the assignee for a general meeting of the creditors of the bankrupt to be held before Mr. Hibbard, register, on the second day of November last, for the purposes named in the 27th and 28th sections of the bankrupt law. Due notice of the time, place and purpose of the meeting was given by the assignee, and the notice also stated that at said meeting a final dividend would be declared. The assignee reported to the meeting an account of his receipts and expenditures as such assignee, but on motion of Mr. Sisson, the meeting adjourned to the 24th of November, and the assignee was directed by the register to prepare and file in the register's office on or before the 16th of November, a full itemized account of his receipts and payments, for the purpose of being examined by the creditors. The assignee, in pursuance of said order, did, on the 16th of November, file said itemized account, with the register, verified by oath, and the vouchers pertaining thereto, and the same remained in the register's office until the day to which said meeting was adjourned, subject to the inspection of all persons interested. The adjourned meeting was held, pursuant to adjournment, on the 24th of November, but was not attended by a majority in number and amount of all the creditors who had proved their debts. At this meeting the itemized account of the assignee was produced and the items for assignee's services, amounting in the aggregate to the sum of \$10,500, discussed by the creditors present, that being the only element of the assignee's account to which any exception seems to have been taken. After the matter had been fully discussed, the regis-

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ter, for the purpose of obtaining the sense of the creditors present upon the charges of the assignee, submitted to the meeting a motion made by a creditor, to the effect that the accounts and charges of the assignee as presented be approved, to which action of the register in the submission of said motion to the meeting, Mr. Sisson and Mr. Witherell objected; but, notwithstanding their objections, the register put the motion to the meeting, and the same was passed by a large majority of the creditors present. Said Sisson then insisting that he had had no time to examine the assignee's account, the meeting was again adjourned until the 27th of November. On the 27th a further meeting was held, pursuant to adjournment, at which meeting the assignee commenced to read his itemized account, whereupon Mr. Sisson moved that the voucher for each item of said account should be produced and exhibited to the meeting by the assignee. It was then stated that the vouchers numbered over 8,500, which statement was conceded to be substantially true. Some of the creditors present then objected to Mr. Sisson's motion, on the ground that he had had ample time for the examination of the accounts and vouchers, and that one adjournment had been had expressly for the purpose of enabling him to examine said accounts, and that he had made such examination; and it was claimed that Mr. Sisson should point out or indicate the items of the account to which he objected. Mr. Sisson refusing to specify any particular item of the account as objectionable, and insisting on the reading of the account and vouchers in detail, a motion was made to dispense with the reading and approve the accounts of the assignee, including his charges for fees and expenses, which, although objected and excepted to by Mr. Sisson and Mr. Witherell, was put to the meeting by the register and almost unanimously adopted; after which proceedings the register audited and approved said assignee's account, except as to the charges for register's fees, the register having examined said account and vouchers and satisfied himself of its correctness.

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To this action of the register in submitting to the meeting these various motions for approving the assignee's charges for fees and expenses, and dispensing with the reading of the accounts and vouchers, and approving the same against the objections of Mr. Sisson and Mr. Witherell, they except, and request the opinion of the court as to the regularity of these proceedings.

The order of court calling this meeting directed it to be held for the purposes of a final dividend. The notice of the assignee seems to have stated that the meeting would be held for the purposes named in section 27 of the bankrupt law, instead of stating that it would be held for the purposes named in sections 27 and 28; but it also stated that a final dividend would be declared, and as all creditors must be presumed to have known that this was not the first dividend meeting, it seems to me the business of making a final disposition of the affairs of the estate and declaring a final dividend was properly and legally before the meeting. One of the preliminaries to the making of such dividend, is the auditing of the assignee's account. The law and rules devolve the duty of passing and auditing the assignee's account upon the register, and the uniform practice by the register of this court has been to submit the assignee's accounts to the creditors' meeting for examination, discussion, explanation and approval before the same was audited, a practice which has always seemed to me eminently just and fair toward all parties interested. Perhaps by the strict letter of the law the assignee's accounts need not be submitted to the creditors' meeting before auditing, but there can certainly be no harm in it, and I am not disposed to change the practice in that regard. The creditors are entitled, before the assignee's accounts are finally approved, to a full examination of the same, and there seems no occasion so appropriate as the duly called dividend meetings for such examination and discussion. In this case the account presented on the first assembly of the creditors pursuant to this call does not seem to have been in strict compliance with the

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rules, at least on objection being made an itemized account with all vouchers was ordered to be filed by the 16th of November in the register's office, and the meeting was adjourned until the 24th. The account and vouchers were filed within the time limited, and all creditors had opportunity to examine the same as fully as they chose for the eight days intervening before the adjourned meeting was held, and some creditors appear to have availed themselves of their privilege. The account was a very long one, involving the collection and disbursement of over \$500,000, and the administration and winding up of the affairs of one of the largest insurance companies existing in this city at the time of the great fire. The vouchers were necessarily numerous.

The only items specifically objected to by any creditor were those charged by the assignee for his own compensation, and no one objected to these except Messrs. Sisson and Witherell.

At the first meeting this item was discussed, and after discussion, a motion was made that the meeting approve the charge and the register took the vote of the creditors present or represented at the meeting on the question.

The meeting, also, on motion dispensed with the reading of the assignee's account and vouchers in detail, although Mr. Sisson and Mr. Witherell insisted upon such reading. I can see no irregularity in this. Neither the bankrupt law nor the rules under it, nor the usages of parliamentary bodies, by which creditors' meetings are properly guided, in the absence of specific provisions of law on any point, require that the entire body of creditors attending a meeting, shall sit and hear read the report and accounts of the assignee, unless they choose to do so, to gratify the whim or caprice of one or two creditors. If the majority of those present at the meeting see fit to dispense with the reading they can undoubtedly do so. Ample opportunity should be given all creditors to examine and object to the assignee's accounts, but that does not require that those who do not wish to make such examination, or have al-

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ready made it to their own satisfaction, should sit through a creditors' meeting to hear those accounts read in detail.

In this case the only objection which took any specific form, or was even worthy of attention, was in regard to the items for assignee's fees and charges, and it was peculiarly appropriate that the register should take the views of the creditors present or represented as to those items. Not that he or the court was necessarily to be governed by the vote in finally passing the assignee's accounts. Yet the item being large and it being presumable that many of the creditors had information in regard to the nature and value of the assignee's services, their judgment on the question is certainly of weight, and the expression of a large majority should not, except for grave reasons, be overruled.

When there is a majority in value of the creditors of an estate present, the action of the meeting, or of a majority of such a meeting, should be as far as possible regarded in any matter resting in the discretion of the court or register, such as the allowing of extra compensation to the assignee. The passing of the general accounts of the assignee and settling his fees as allowed by law are, however, matters with which the creditors' meeting has nothing to do except so far as the register sees fit to submit them to the meeting for advice or information. Nor does it make any difference whether there is a majority in number or value of the creditors present or represented at such meeting. It is just as proper to take the sense of those present on any of these questions as if all were present. The meeting is a legal meeting, and what is done by those present is as binding as if all the creditors were present. Neither a minority nor majority can audit the assignee's accounts; that is the duty of the register.

The real grievance, if I properly understand these proceedings and objections, consists in the fact that the assignee charged \$2,500 more than his legal fees, and the register, after said charge had been approved by the creditors present, approved the account including this item.

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By the 27th and 28th sections of the bankrupt law, assignees besides being allowed certain specific fees may be allowed a reasonable compensation for their services in the discretion of the court. This allowance of extra compensation is no part of the duty of the creditors' meeting nor of the register, but is to be allowed by the court in the exercise of its judicial discretion in view of the nature of the duties performed by the assignee and the degree of compensation he has already received from the regular fees. But for the purpose of determining the propriety of such an allowance, it is eminently proper that the question of its fairness should be, if practicable, submitted to the creditors in some form. If it is charged into his general account which creditors have had an opportunity to examine, and no objections are made, or if submitted to a creditors' meeting and sanctioned by an almost unanimous vote of the creditors present, such action would have great weight with me in determining the propriety and amount of the allowance, and if the meeting was largely attended I should consider the vote in favor of the allowance almost potential.

The certificate in this case shows that the register allowed and audited the assignee's entire claim after taking the vote of the meeting. In this I think he erred. The proper practice I think would be where an assignee claims extra allowance for him to apply to the court for such allowance previous to the final meeting, and the court, on hearing the application, can allow such amount as the facts justify, which would then be properly chargeable as an item in the assignee's account to be reported to the meeting and audited by the register.

The practice, however, in this district has heretofore been to submit the entire claim of the assignee to the creditors at the final meeting, and if approved by a majority, the register passed the account without submitting it to the court. I do not intend by what I have said to disturb any settlements of assignee's accounts which have been made and passed unchal-

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lenged, but only to indicate a practice for the future, and to say that in this case leave will be given the assignee to present his claim for extra allowance at any time before the dividend is paid.

UNITED STATES *vs.* SAMUEL RINDSKOPF *et al.*

DISTRICT COURT.—WESTERN DISTRICT OF WISCONSIN.—DECEMBER, 1874.

1. CONSPIRACY, under the revenue act of March 3, 1867, is a combination between two or more persons to effect the purpose declared by the act to be illegal. The agreement may be expressed or implied, and the gist of the offense is the illegal conspiracy, the particular manner in which it was done, or to be done, not being material.

2. It is not essential that any but the leading conspirator know the exact part which another was to perform.

3. TWO CONSPIRATORS SUFFICIENT.—If two are shown to have conspired, the acquittal of others jointly indicted does not prevent the conviction of such two.

4. The fact that the overt acts charged and proven were severally criminal, is no answer to an indictment for conspiracy, and an overt act, in itself criminal, may be proven, to show the existence of the conspiracy charged.

5. Many cases cited and commented upon.

6. PLACE OF TRIAL.—The defendants may be tried in any district where the overt acts were committed.

The defendants were indicted for conspiracy under section 30, act of March 2, 1867. It was alleged in the indictment

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that Alexander L. Rogers was the owner of a distillery at Middleton, and for the purpose and with intent to defraud the United States out of the tax upon the spirits manufactured thereat, conspired with Samuel Rindskopf, liquor dealer, of Milwaukee, Albert Mueller, his distiller, and James W. Bull, store-keeper at said distillery, to aid and assist him in carrying out such purpose; and that they did, in pursuance thereof, manufacture, dispose of, and defraud the government out of the tax upon large quantities of spirits manufactured thereat, and setting forth the various and illegal means and devices used for that purpose.

Before the trial commenced, a *nolle prosequi* was entered as against the defendant Alexander L. Rogers. On the trial against the other defendants, he was called as a witness, and testified that he went into the business for the purpose and with the intent to manufacture illicit spirits; that after he had commenced, he went to Milwaukee and saw Rindskopf, and there told him, in substance, that he was engaged in manufacturing illicit spirits, and that he could get them from the still or Government warehouse to his rectifying house without paying taxes, but he did not know how to get them from there upon the market, and asked Rindskopf to assist him, and that Rindskopf then told him he would go in with him and take the wines, and pay him Chicago prices, less twenty-two cents, which he was to retain as his share of the speculation or risk; that Rindskopf told him how to proceed to get them to his house, to wit., that he (Rogers) should put them in new barrels at the rectifying establishment, and get the gauger here to gauge them as whisky, and put on whisky stamps and ship them to his firm as such; and that they would receive them at the depot, and pay for them at the prices named. And he further stated that, under that agreement, he sent to them high wines under such false labels, from time to time, and that they were received and paid for upon the terms of that agreement; stating the mode

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and amount of two of the payments. Rogers stated that after that he continued to manufacture illicit spirits, and that Mueller was the distiller and did the work, or superintended it, and that Bull, the store-keeper, had full knowledge of it, and received from him \$100 per month for neglecting his official duty, and permitting him to use what material he wished, and to take the spirits from the warehouse without payment of the tax. He further stated that, after some trouble with the revenue officers in February, he was ordered to send them two-stamp goods, and, if not detected, he would not enter them on the books.

Henry Lacher, another witness, testified that he had charge of the rectifying house under Rogers first, and afterwards under Rogers & Bunker, and that spirits were often received at the rectifier and dumped, upon which the Government tax had not been paid, and described the means adopted to accomplish that purpose, particularly, and that such spirits or highwines were afterwards placed in other barrels and marked whiskies, kimmel or bitters, and stamped by the gauger either as whisky at 66 or 68 proof, or as bitters, no proof, and that they were shipped by rail to Rindskopf Bros., Milwaukee; that they were entered on their book at the rectifier according to the gauger's mark, and Rindskopf Bros. were charged with them at the market rates for such goods. This, he said, continued up to about the 11th of February, when he changed and shipped them as highwines with two stamps, but that they were, with a few exceptions, got out of the warehouse and placed in stamped barrels and no tax paid thereon. He further said that he received statements of sale and account and that they were paid for as highwines at the rate stated by Mr. Rogers, to wit.: Chicago prices and twenty-two cents off; that those statements and letters accompanying were returned to Mr. Rindskopf at his request after seizure.

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Other testimony was given sustaining and corroborating these general facts.

J. C. Kenney, for the United States.

H. S. Orton, Geo. B. Smith, P. L. Spooner, Gregory & Pinney, G. W. Goodwin, and H. M. Lewis, for defendants.

HOPKINS, J., charged the jury as follows:

The defendants were indicted under section 30 of the act of March 2, 1867, United States Revenue Laws, for a conspiracy; this section reads as follows:

"If two or more persons conspire, either to commit any offense against the laws of the United States or to defraud the United States in any manner whatever, and one or more of said parties to said conspiracy shall do any act to effect the object thereof, the parties to said conspiracy shall be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to a penalty of not less than one thousand dollars, and not more than ten thousand dollars, and to imprisonment not exceeding two years."¹

The act declares what illegal purposes constitute a conspiracy. But in construing it, it becomes necessary to ascertain what is meant in this act by conspiracy. It may be defined as an agreement or combination between two or more persons to effect the purpose declared by the act to be illegal,—to do one of the things prohibited in the act. The indictment here in substance charges the conspiracy to be to defraud the United States out of the tax upon certain spirits to be distilled at the distillery of Alexander L. Rogers, in Middleton.

In the first count the charge of an agreement to manufacture illicit spirits at that place is expressly alleged. In other parts it is also alleged that the agreement was to do so by

¹ 14 U. S. Statutes at Large, 484.

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breaking seals and stamps placed upon certain tubs, and to use them unlawfully for the purpose of manufacturing illicit spirits. I have ruled during the trial that the gist of the offense was the illegal conspiracy to manufacture, and that the particular manner in which it was done, or to be done, was not the material question in the case; that the question to be determined under this count was whether there was a conspiracy between the parties to manufacture and remove spirits so manufactured without the payment of the lawful tax, to defraud the United States. Now the question is, did the parties, or any two of them, enter into a scheme to illegally manufacture spirits, with intent to defraud the government out of the tax by law imposed thereon. If they did, it constituted a conspiracy within the meaning of the act above mentioned, and on that question it is immaterial whether a seal or stamp was broken or not.

In order to charge the parties as conspirators, I do not think it necessary to prove an express agreement between all the parties to do the illegal act. It would be enough if you should find that all of them had the same illegal purpose in view and each acted a certain part to accomplish or tending to accomplish it. But you must be satisfied that each had the same common design and acted to carry such design into effect. In other words, if you should find that Rogers' purpose was to unlawfully manufacture spirits and remove the same from his distillery, and place them upon the market without paying the tax thereon, and that as a part of such corrupt purpose, he induced the storekeeper, Bull, to abstain from doing his official duties, so that he could obtain the material contrary to law, to use for such purpose, and employed Mueller, his distiller, to secretly manufacture the same into spirits, and, to assist him in his unlawful purpose aforesaid, employed Lacher to receive and conceal such spirits in the rectifying establishment of said Rogers, and by an agreement with the defendant Rindskopf, and at his suggestion, Lacher and the government gauger were employed

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to place said spirits into other barrels and gauge them as whisky and other articles of less proof, and then ship them under such false and fraudulent stamps to the defendant, or to the house of which the defendant was a partner, and that said defendant personally knew of their receipt under such false labels and stamps, and concealed or aided in concealing such facts, to defraud the government, and for the purpose of enabling the said Rogers to defraud the government, out of the legal tax thereon and share the proceeds with him,—you might be at liberty to infer from these facts that the parties acting for the common purpose were all guilty of conspiracy. It would not, in such a case, be necessary to show that the parties had any previous acquaintance, or, with the exception of Rogers, knew of the exact part the other was to perform. In such a case, each might be considered a co-conspirator with Rogers, and being so, would be responsible for his acts in carrying out the illegal purposes. And if you should find such acts to have been done in the carrying out of such illegal purpose, and that the illegal purpose was common to all, you would be authorized to find that the conspiracy was established as to all. If they knew the intention of Rogers, in procuring them to do such acts, to be to defraud the government, and that their acts respectively aided and assisted him to carry into effect such illegal purpose, and that they did the several acts to them assigned, on purpose to enable Rogers to successfully carry out his illegal designs, it would be a conspiracy as to all of such parties, if their overt acts are satisfactorily proven.

In determining the question of conspiracy, Rogers may be reckoned as one, so that if either of the others conspired with him to do the acts alleged in the indictment, although you might find that the other defendants did not conspire with them, you might find that one guilty under this indictment, provided the overt act to effect it is satisfactorily proven.

The defendants were all found guilty by the jury.

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On motion for new trial and in arrest of judgment.

HOPKINS, J.—The defendants having been convicted by the jury of the conspiracy charged against them, now move the court for a new trial and in arrest of judgment, and have, in the argument in support of the motion, mainly relied upon the following points.

1st. That the court erred in its charge as to what constituted a conspiracy.

2d. That as the overt acts set out and proven were severally criminal, and the parties committing them were liable to a specific punishment, after such acts had been performed the parties could not be held liable for a conspiracy to do them; and,

3d. That the verdict is against evidence.

The first two are those mainly relied upon. As to the first, after listening to the able and ingenious argument of the learned counsel, and after a careful and critical re-examination of my charge on the question, I am thoroughly satisfied that I correctly instructed the jury on that point. The instruction and charge on that question is supported and warranted by the following authorities:

Rex vs. Cope, 1 Strange, 144; *The People vs. Mather*, 4 Wendell, 260, *et seq.*; *Rex vs. Parsons*, 1 Wm. Blackstone's Reports, 392; *Gardner vs. Preston*, 2 Day's (Connecticut) Reports, 205; *United States vs. Cole*, 5 McLean, 513; *Commonwealth vs. Warren*, 6 Massachusetts, 74; *Regina vs. Murphy*, 8 Carrington & Payne, 297; 3 Greenleaf's Evidence section 93; 2 Bishop on Criminal Law, section 187.

The law upon the second point I find too well settled and uniform against the defendants to be at this time questioned.

The fact that each of the overt acts constitutes an offense is no answer to this indictment for conspiracy. Upon a charge

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of conspiracy, an overt act, which is itself criminal, may be proven, to show the existence of the conspiracy charged. Conspiracies, from their very nature, are usually entered into in secret, and are consequently difficult to be established by direct evidence. It has been, therefore, universally held that they may be inferred from circumstances. The common design is the essence of the charge, and may be shown by circumstances and the acts performed by the different alleged conspirators; and the fact that the several acts constitute separate criminal offenses, does not exonerate the parties from the crime of conspiracy, or bar a prosecution therefor. This is sustained by an almost unbroken chain of authorities, both in this country and England.

In *Regina vs. Boulton et al.*, 12 Cox's Criminal Cases, part 3, page 87, in Court of Queen's Bench, before Ch. J. Cockburn, in 1871, although the course of receiving proof of the commission of the substantial crime is not regarded as satisfactory, yet it is decided that such a course is legal, and in that case, it being a charge of conspiracy to commit a felonious crime, proof of the commission of the crime itself was allowed. The chief justice cited and relied upon the authority of the late Lord Cranworth, in *Regina vs. Rowland*, 5 Cox's Criminal Cases, 497, note. In that case the parties had been indicted, not for the offense they had committed, but for a conspiracy to commit it, and the judge, after stating that it would have been more satisfactory if the parties had been indicted for what they had done and not for conspiracy to do it, stated "that the course pursued was no doubt legal, and, being legal," he said, "I shall not now step out of the path of my duty by speculating upon the policy that has been adopted in this case. It would be much more satisfactory to my mind if parties had been indicted for that which they have directly done, and not for having previously conspired to do something, the having done which is proof of the conspiracy. It never is satisfactory, although undoubtedly it is legal." I

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have quoted this language as expressive of my first view of the question when raised during the trial, and I can say now as I said then, that the better way, in my judgment, would have been to have indicted all parties here for the particular offense committed by each, but under the law it seems I have not the right to say they must be so prosecuted. The course pursued in this matter by the government attorney, in the language of those cases, is "undoubtedly legal," and I can, therefore, only consider the case as it is presented on this indictment.

These cases, if followed, dispose of the second question so strenuously pressed by defendants' counsel. The case of *Commonwealth vs. Kingsley*, 5 Massachusetts, 106, laying down a contrary doctrine, does not seem to have been followed in that state, for the same judge, Parsons, in *Commonwealth vs. Warren*, 6 Massachusetts, 74, refused to arrest a judgment on a charge of conspiracy, where the overt act was a felony, and was completed and the avails of the crime divided; and in *Commonwealth vs. Davis*, 9 Massachusetts, 415, it is held that acts in execution of the conspiracy may be shown, in aggravation. In the case in *United States vs. Boyden et al.*, 1 Lowell, 266, being an indictment under the same act and section as this, this question was raised and examined upon principle and authority, and Judge Lowell, before whom it was tried, arrived at the conclusion that though the act concerning which the conspiracy was formed was completed, and there was a specific penalty for doing that act, still the government could elect under which to proceed. This doctrine is also supported by *People vs. Mather*, 4 Wendell, 259; *Colins vs. Commonwealth*, 3 Sargent & Rawle, 220. The dictum in the opinion of Senator Spencer, in *Lambert vs. The People*, 7 Cowen, 103, I do not think entitled to much weight, as the case there did not turn on any such question. Indeed, it is impossible to tell what principle was settled in that case in the Court of Errors.

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On the other point, that the verdict is not supported by the evidence, I need only say that if the jury believed the testimony of Rogers and Lacher, the charge was most clearly made out. Assuming their testimony to be true, the fact of an unlawful conspiracy to defraud the government out of the tax upon spirits to be manufactured at Rogers' distillery, as charged, is established beyond all controversy. The section of the act declaring the conspiracy expressly provides that the parties may be tried in any district where the conspiracy is committed, or an overt act is done in furtherance of the illegal purpose. The overt acts were performed in this district, and the case is properly triable here.

The motion for a new trial and in arrest of judgment is overruled.

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DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JANUARY, 1875.

IN BANKRUPTCY.

1. FAILURE TO SURRENDER OR ACCOUNT FOR PROPERTY—CONTEMPT.—If it appears to the district court that a bankrupt has neglected or refused to surrender any property which ought to come into the bankruptcy court, or fails or refuses to give a satisfactory account of his property or his dealings previous to bankruptcy, the court may order him to surrender such property, or properly account for it, and on failure so to do he may be committed for contempt.

2. INSUFFICIENT ANSWER.—Where property is traced to the bankrupt, it is not a sufficient answer that he cannot say what became of it. The court must be satisfied that the bankrupt has fully and honestly accounted for the property according to the facts.

3. DEPLETION OF STOCK—PRESUMPTION.—Where just prior to the proceedings in bankruptcy the bankrupt's stock of goods was rapidly diminishing, and not in the ordinary course of business, the legitimate conclusion is that it was fraudulently removed and concealed, and the bankrupt will be presumed to still have control of it.

Motion to commit bankrupts for contempt in not accounting for assets.

On the 8th of October, 1873, certain creditors of Salkey & Gerson filed their petition asking that they be adjudicated bankrupts; and on the 23d of December a trial was had upon the issues in the case, denying the acts of bankruptcy charged, and a verdict rendered, finding the debtors guilty of the several acts of bankruptcy charged, upon which they were adjudicated bankrupt in due form. Pending the proceedings, and before the trial, on the application of the provisional as-

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signee and certain creditors, an examination of the bankrupts was had under oath, before the register touching their estate. And on the 19th of January, a further examination was had at the instance of certain creditors, under the 26th section of the bankrupt law, which examination was duly reported to the court by the register, and from which it appeared,—

First, That the bankrupts were, from the first day of January, 1873, to the filing of the petition in bankruptcy against them, co-partners doing business as merchants in Chicago, under the firm name of Salkey & Gerson, their business being mainly that of wholesale and retail dealers in clothing and gentlemen's furnishing goods, and to some extent manufacturers of such goods.

Second, That said firm had, at the time of commencing business as aforesaid, goods and merchandise of the value of eleven thousand dollars on hand; that they had also outstanding accounts of the firm of Salkey, Lebrecht & Co., of which Salkey & Gerson were the successors, to the value of over forty-five hundred dollars; and owed Lebrecht, the late partner, forty-five hundred dollars, for which he held the accounts of the old firm as security; in other words, that Salkey & Gerson, at the time they commenced business, had invested in goods at a fair cash valuation, for the purposes of their business, over eleven thousand dollars, and owed, substantially, nothing.

Third, That between the said first day of January, 1873, and the filing of said petition in bankruptcy, said firm purchased goods and merchandise which went into their store, and which had not been paid for at the time proceedings in bankruptcy were commenced, to the amount of over thirty-five thousand dollars.

Fourth, That the total assets turned over by said firm to the assignee, were not, at the valuation put upon them by the bankrupts themselves, worth over nine thousand dollars, and no attempt was made to account for this deficiency.

On the returning into court of the evidence taken before

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the register on this examination, a hearing was had, in which the court found and adjudged from said proof, that said bankrupts had a large amount of assets in their hands during the year preceding their bankruptcy, for which they gave no satisfactory account, and ordered that the bankrupts appear before H. N. Hibbard, Esq., one of the registers of this court, on the 31st day of January, 1874, and such other times as the register should appoint, and give a true and satisfactory statement and account of the assets of said firm, and what had become of the same, and where they then were; and that said statement be given under oath and reduced to writing by the register, and returned into court.

The bankrupts accordingly appeared before the register on the day named in said order, and stated under oath, in substance, that they had no further account to give of their said assets. Motion was then made that the bankrupts be committed to jail for contempt in not accounting for and delivering to their assignee the said deficiency between the assets traced to their hands by their own admissions under oath, and what they had already surrendered.

Tenneys, Flower & Abercrombie, for creditors.

Grant & Swift, for bankrupts.

BLDGOTT, J.—This motion has been taken under advisement, and carefully considered, because of the importance of the question involved, bearing not only upon the rights and interests of these men, but upon the general administration of the bankrupt law.

By the 26th section of the bankrupt law it is provided: "That the court may, on the application of the assignee in bankruptcy, or of any creditor, or without any application, at all times require the bankrupt, upon reasonable notice, to attend and submit to an examination on oath, upon all matters relating to the disposal or condition of his property; to his trade and dealings with others, and his accounts concerning

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In Taylor's case, reported in 8 Vesey, 328, the committal of a bankrupt was held valid, though he swore positively to his answers, as it was made to appear that they were not reasonably satisfactory to the commissioners, the Lord Chancellor Eldon saying that the answers "must be reasonably satisfactory to the mind that is to decide" upon them. The commissioners have a duty imposed upon them, as well as an authority to get out an account and discovery for the benefit of the creditors; and if he does not make a satisfactory answer for the purpose of enabling them to exercise their duty, they have authority to commit. If the authority depends upon the point whether the answer is satisfactory, those who have that authority must exercise it upon their judicial examination and view of the answer upon the point, whether it is satisfactory or not."

So too, in *Ex parte Lord*, 16 Meeson & Welsby, 462, the court refused to discharge the bankrupt from custody "for not answering questions to the satisfaction of the commissioner, where they were of opinion that the story contained in his answers is not such as to satisfy a reasonable person of its truth."

There is also a close analogy between this case and that of a defendant in a suit in equity, brought by creditors when the debtor is required to surrender his assets to a receiver, in which any refusal to deliver over assets, or satisfactorily account for them, is punished as a contempt.¹

So a refusal by a party in a chancery suit, to obey any order of the court, subjects the party guilty of such refusal to punishment for contempt.²

The district court as a court in bankruptcy is clothed with all the powers of a court of equity. When a man is adjudicated bankrupt, he is bound to schedule and surrender to the

¹ 2 Danniells' Chancery Practice, 1742.

² *Crook vs. People*, 16 Illinois, 534; *Hill vs. Orandall*, 52 Illinois, 70; *Wightman vs. Wightman*, 45 Illinois, 167.

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proper officers of the court all his assets. And if it is made to appear to the court by an examination under the 26th section, or in any other manner, that the bankrupt has refused or neglected to surrender any portion of his property which he ought to have surrendered in the first instance, he may be ordered to surrender such property, and if he fails to do so he may be punished for contempt. And the delegation to the court of power to require an account to be given by the bankrupt of all matters relating to the disposal of his estate, and his dealings with others, and acts concerning the same, implies of itself a power to punish if a satisfactory account is not given. The court, in other words, must be satisfied that the bankrupt has rendered a full and complete account of his property, and given a true statement of the disposal of the same, and if the bankrupt fails to so satisfy the court, he is liable to the process for contempt. Not that the court can capriciously or unreasonably insist upon explanations which are not necessary to a full understanding of the bankrupt's affairs, but the judicial mind must be satisfied, after full examination and opportunity for explanation, that the bankrupt has not fully accounted for the property which has been in his possession.

The power vested in a court of justice to punish for contempt, for the purpose of enforcing its decrees and orders, and, especially in cases like this, is one which should be, to use the language of Lord Eldon in Taylor's case, "sparingly exercised," and only in cases where there can be no doubt of its propriety.

In Dresser's case, reported in 3 Bankrupt Register, 2d ed., 557, the bankrupt returned by his schedule a sum of money on hand; failing to deliver it to his assignee, he was called upon to account for it, and stated that he had used it between the time of filing his petition and the election of the assignee, and the court ordered him committed for contempt, until he should pay it over to the assignee.

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Our bankrupt law contains no special authority to commit for refusal to answer or account to the satisfaction of the court; and yet it seems to me there can be no doubt that the principle running through all the cases which I have cited is clearly involved in our law. The bankrupt, when on examination, after admitting the possession of property, must clearly account for the same to the satisfaction of the court; otherwise he must be held to still have it in his possession, and be able to hand it over to his assignee, and on failing or refusing to account in a reasonable manner for the disposition of assets which have been traced to him, must be held to be acting in contempt of the jurisdiction of the court.

The bankrupts in this case occupy substantially the attitude of saying to the court: We have had in our possession assets to the value of over \$20,000, between January and October, 1873, and refuse to give any account thereof. We have not turned them over to our assignee. We do not admit we have them now in our possession. The court and creditors must help themselves; do the best you can; we stand mute, and refuse to throw any light upon the subject of the disposition of this large amount of funds.

Is the court to sit tamely by and be baffled by such acts of practical contumacy on the part of a bankrupt? Perhaps no more forcible illustration of the necessity of the exercise of the powers specifically granted to the English bankrupt court, and as I have claimed, impliedly granted to the bankrupt courts under our law, could be imagined than the case before us. Here the bankrupts admit that between the first of January, 1873, and the time that proceedings in bankruptcy were commenced against them, they had merchandise and property in their possession which they had purchased on credit and not paid for, to the value of over \$35,000. They refuse to explain what has become of that property; they offer no hypothesis to account for its disappearance; but simply say, in response to the final order for accounting, that they have no further account to give. Can it be said that any reasonable

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mind should be satisfied with such an accounting by a bankrupt for his assets? Can it be said that a court charged with the administration of the estate of a bankrupt, and bound to see that all the estate goes to the assignee for the benefit of creditors, is to be satisfied on such a showing that the bankrupts have honestly turned over to the officers of the court all their assets? Ought the court to be put off with mere silence or refusal, or neglect to account in a reasonable manner for assets traced clearly to and admitted by the bankrupts themselves to have been in their hands and under their control at so recent a date? The administration of bankrupt estates is in the main unsatisfactory enough at best, but how much more must it be if there is no power to unearth concealed assets, and compel bankrupts to disgorge their hidden property? The duty of the bankrupt is to honestly account for his assets according to facts. He may have lost his property by unfortunate speculations, or gambling even, so that it is beyond his reach or that of his assignees, and a true statement of the facts would be an accounting for it. That is a showing what has become of it, within the intention of the law, but until some explanation is made, the court must hold the bankrupt answerable.

If upon such an examination it is made to appear to the satisfaction of the court that a bankrupt has assets secreted which he has not delivered to his assignee, surely it could not be expected that the court should be content with the mere barren results of the information which the examination should give; but the court clearly has the power to enforce the surrender of the property, if it appears to the satisfaction of the court that it is still in the control of the bankrupts themselves, or no disclosure is made to show that any other person has possession of it.

The conclusion is inevitable, from the admissions of the bankrupts in the examinations, that they still have the possession in some manner of those goods or their proceeds; or they have information and knowledge as to where the goods

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or proceeds can be found, and fraudulently withhold such information.

It appears from the evidence in this case, that for several weeks prior to the proceedings in bankruptcy, the goods of the bankrupts were manifestly disappearing from their store. Creditors calling there to collect their overdue bills, saw from day to day and from time to time, as they called, that the stock of goods was diminishing rapidly. And it cannot be supposed that the bankrupts, who were every day about the store, did not know where these goods went. They were not sold on credit in the usual way, for their books of account contain no outstanding accounts of any consequence. The only natural and legitimate conclusion must be that they have been fraudulently removed and concealed, for the purpose of defrauding the creditors, and that the bankrupts now know where these goods or their proceeds are. Honest men would at least make some attempt to explain this large depletion. It even appears that when creditors called for their pay, and mentioned the fact that the stock in the store was rapidly diminishing, they were laughed at, derided and defied by the bankrupts, and told they could not help themselves. And when the store was finally closed by the proceedings in bankruptcy, only goods to the beggarly amount of \$6,000, at the bankrupt's own valuation, remained to represent the \$35,000 of indebtedness which had been contracted by these men for goods which had gone into their store in the preceding eight months, and remained unpaid for.

There were no outstandings upon their books; no bills receivable; no assets, except the remnant of the stock of goods subsequently sold for less than \$3,000, and the store fixtures.

If ever there was a case where the circumstances pointed indubitably to the conclusion that the bankrupts had deliberately and willfully secreted their goods or the proceeds thereof, for the purpose of preventing them from coming into the hands of their creditors, this is such a case. And yet, on being arraigned and asked by the court to account for these

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goods, the bankrupts coolly say, they have no further account to give.

It seems to me that the court ought not to allow itself and the creditors of these men to be mocked in this way. It ought to compel these men to account for these goods, to tell where they have gone, to disgorge the proceeds or tell who has them, in order that the assignee may obtain them, and that not only that justice may be done to the creditors of these bankrupts, but that such high-handed and impudent attempts at swindling may, as far as possible, be prevented in future.

The order of the court, therefore, will be that the bankrupts stand committed to jail until they shall account for the goods thus traced into their hands.

On petition to Judge Drummond for a writ of *habeas corpus* this ruling was affirmed. See following case.—[*Reporter*.

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Ex parte SAMUEL SALKEY AND JOSEPH GERSON.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—FEBRUARY, 1875.

IN BANKRUPTCY.

1. COMMITMENT FOR NOT FULLY DISCLOSING PROPERTY.—Under the twenty-sixth section of the bankrupt act the district court has authority to commit a bankrupt, if satisfied that he has not fully disclosed the facts concerning his property.

2. COURT MUST BE SATISFIED.—The court is not bound to accept his answer, that he has told all that he knows about his property, if it clearly appears that there is still property unaccounted for.

3. The district court must be satisfied that he has made a full disclosure, and *it seems that* the circuit court has power to review the finding if the evidence is brought before it.

4. PRACTICE.—The circuit court may direct the district court to allow the bankrupt to be re-examined before the register; and on the return of an attachment the court should examine the bankrupt.

Application by bankrupts for a writ of *habeas corpus*, to discharge them from an order of commitment for contempt made by the district court. For opinion of the district court on the commitment, see preceding case.

Grant & Swift, for petitioners.

Tenneys, Flower & Abercrombie, for creditors.

DRUMMOND, J.—The material facts in this case are these: Proceedings in bankruptcy were commenced against the petitioners in the district court of this district, and while they were pending, application was made to the court for leave to

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examine the alleged bankrupts under the twenty-sixth section of the bankrupt law, and they were accordingly examined. The result of the examination seems not to have been satisfactory to the creditors, and an application was again made to the court and the court required the parties to go before the register a second time, the court not being satisfied that the bankrupts had given a full and true account of their property. They, in pursuance of the order of the court, went before the register again, and were interrogated in a general way, and required to give a full and satisfactory account of all their assets, and they in substance stated that they had given all the account they could; that they had turned over their property to the marshal under the warrant issued, and that that, together with their losses, was the only account they could give.

This being reported to the court, an attachment was issued against them, and they were brought before the court, and the question argued as to the right of the court to commit them for not giving a satisfactory account of their property. And I think the fair inference is, that they had taken their stand upon the answer they had given, and were not inclined to say anything further; because it is manifest, if they had come before the court, and had said that they were willing to give further answers in relation to their property, the court would not have made the order of committal.

The court accordingly directed the parties to be imprisoned for non-compliance with its order.

There is not brought before me on this application for a writ of *habeas corpus*, the testimony which was considered by the district court, and on which that court found that the parties had not given a full and satisfactory account of their property. The result was an adjudication by the district court to this effect: That there was shown to be in possession of the bankrupts, at a certain time, property not contained in their schedule, and of which they gave no account, to the amount of about \$20,000; that the parties had fraudulently, and with the intent to deceive, delay and hinder their creditors and the

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officers of the court in the administration of their affairs, concealed the \$20,000 worth of merchandise, or the proceeds thereof, and refused to account for the same; therefore the court committed them.

It seems to me that the only inquiry in this court at present is, whether the district court had, in the case stated, the power to imprison the parties. The clause of the 26th section of the bankrupt law declares that, "The bankrupt shall at all times, until his discharge, be subject to the order of the court, and shall at the expense of the estate, execute all proper writings and instruments, and do and perform all acts required by the court touching the assigned property or estate, and to enable the assignee to demand, recover and receive all the property and estate assigned, wherever situated. And for neglect or refusal to obey any order of the court, such bankrupt may be committed and punished for a contempt of court."

Now, upon the theory on which the court proceeded, and if the facts were as found by the court, had the court authority to imprison these parties, although, upon being recalled before the register, they said they had told all they knew upon the subject?

Was the court absolutely bound by that answer? It seems to me very clear that it was not. The main object of the bankrupt law is to distribute the property of the bankrupt to his creditors equally. The creditors are entitled (or the assignee representing the creditors is entitled), to all his property, and the bankrupt law assumes that the bankrupt may possess knowledge in relation to the property which should be communicated to the creditors and the assignee; therefore it is that the law gives authority for the examination of the bankrupt, and requires him to make a full disclosure as to his property.

It would be a most extraordinary state of affairs if the bankrupt could spirit away any amount of property, and that fact should be made manifest to the court, and there should be no power in the court to compel him to state what had become of

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it. That would be manifestly a most unsatisfactory bankrupt law, if the bankrupt could hold back and say, "I have given all the information on this subject that I choose to give or that I can give, and you must help yourselves as best you can," although it may be manifest beyond all controversy, that he has concealed a large amount of property.

It seems to me that it was one of the objects of the 26th section to provide that the bankrupt should impart all the information he possesses in relation to the property; and that is one of the grounds upon which the court proceeded, that they did not tell where the property was, or what had become of it. One of the objects of the law is, "to enable the assignee to demand, recover and receive all the property and estate assigned, wherever situated."

Now suppose in this case that the bankrupts have turned over to their wives, or some near relative or friend, for their own use, twenty thousand dollars worth of property. Is the court to be satisfied simply because they say "We do not know anything about it; we have said all that we can upon the subject"? It seems to me that it cannot be so, and it is not necessary to cite authorities upon the subject. The authority is in the statute. Can the court make the order? Can it require the bankrupt to disclose? It is said that all that can be done is, if the bankrupts have stated what is untrue, that they can be prosecuted criminally. I answered during the argument, and I repeat now, a criminal prosecution does not pay the claims of the creditors.

The creditors have a right to all the property of the bankrupt, and it is a poor comfort to them to be told that the bankrupt can hide his property, and for such concealment, or for giving false evidence in relation to the property, he can be prosecuted criminally.

I cannot doubt therefore, if it clearly appeared that the bankrupts spirited away property to the amount of \$20,000, that the court was not deprived of the right to punish them for the non-disclosure of the facts in the case, because they have stated they have told all they know about it.

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I cannot look into this evidence. It is not all before me; I, therefore, cannot say, in this inquiry, whether or not the opinion of the court upon the evidence was well founded. I have to take the conclusion of the court upon that subject, and, if that conclusion was right, I can have no doubt of the authority of the court to make the order which was made. Undoubtedly, wherever it satisfactorily appears that the bankrupts have made a full disclosure, the imprisonment would be unlawful; and if, instead of bringing a writ of *habeas corpus*, the parties had asked this court to review the decision of the district court upon the evidence before it, then this court could determine whether the conclusion of the district court upon the evidence was correct or not; whether, in other words, it did satisfactorily appear that the bankrupts had not made a full disclosure.

The objection is made that it may be difficult, if not impossible, to satisfy the court; the answer to all which is, that there must be placed, somewhere, a power to judge of this. The law has placed it in the district court, its action, of course, subject to review by this court. There must always be a last resort for the determination of legal questions; and in all litigation the court must be satisfied in order to decide. And so, in this case, whether or not the parties have made a full disclosure, whether or not they are subject to punishment, are questions for the district court in the first instance to decide; and there is no other or greater objection in this case than there is in any other case where questions come up for decision in the course of litigation.

But as I said during the progress of the argument, my desire is to have the parties make a full disclosure of all the facts within their knowledge, if they have not, and I think the case is a little different from the position of an ordinary writ of *habeas corpus*, and as this is a case under the bankrupt law, that the court may possess more power over the real controversy in this case than exists generally where applications are made for such writs; therefore I shall direct the district

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court to allow these parties to go before the register, and to be re-examined by him, and to have the register report, as the result, his opinion whether or not, upon all the facts, they have made a full disclosure of what they know.

I think, perhaps, that under ordinary circumstances, the true rule would have been in such a case, where the attachment for contempt was issued, and the parties appeared before the court, for the court itself to examine them, and satisfy itself upon the examination whether or not they had made a full disclosure.

But, as I have said before, I infer that the parties had taken their position and had resolved that they would not say anything more upon the subject, but would stand upon what they considered their reserved rights.

I shall therefore not discharge these parties upon this writ, but refer the case back to the district court with the direction that I have stated; then, if they are dissatisfied with any order which the district court may make, they can bring it for revision to this court.

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THOMAS G. GAYLORD *et al* *vs.* THE FORT WAYNE,
MUNCIE & CINCINNATI RAILROAD COMPANY.

CIRCUIT COURT.—DISTRICT OF INDIANA.—FEBRUARY, 1875.

•IN EQUITY.

1. **FORFEITURE OF FRANCHISE.**—The court will not forfeit the franchise of a corporation on the application of individuals; the right belongs to the state alone.

2. **PRACTICE.**—But if a bill prays for a receiver and general relief, the court will retain the bill for that purpose; a forfeiture of the franchise is not essential to the power of appointing a receiver.

3. **CONFLICT OF JURISDICTION.**—The court which first takes jurisdiction of a controversy and the parties, is entitled to retain it to its final termination, and also to take possession of the *res*, subject of the controversy, exclusive of all interference from any other court of concurrent jurisdiction; and it is not essential that the court first taking jurisdiction of the controversy should also first take the actual possession of the *res*.

4. **PRIORITY OF POSSESSION.**—If a receiver appointed by another court on bill filed pending this controversy, takes prior possession of the *res*, his possession is wrongful and should give way to the prior jurisdiction of this court.

5. **AMENDMENTS.**—The fact that the allegations of the bill were imperfect, and a demurrer was sustained, with leave to amend, does not change the fact of jurisdiction; as the amendments relate back to, and become part of, the original bill.

6. **LIS PENDENS.**—This doctrine does not apply to such a case.

McDonald & Butler and *Hanna & Knefler*, for complainants.

Coombs, Morris & Bell, for defendant.

DRUMMOND, J.—By the act of June 16, 1852, of this state, it was provided that whenever a judgment was recovered against

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a corporation other than banking, and it remained unpaid for the space of a year after the rendition thereof, and execution was not stayed by appeal or supersedeas, the proper court should have power to declare the franchise of the corporation forfeited, and to appoint a receiver, who was to reduce the assets of such corporation to possession, and pay the debts of the same.

The plaintiffs in this case, having recovered a judgment against the defendant in this court in January, 1873, and the same remaining unpaid within the terms of the statute for more than a year, in April, 1874, filed a bill in this court asking for the forfeiture of the franchise of the corporation, and also that a receiver be appointed by the court, that he be ordered to reduce the assets of the corporation to possession, and use the same to pay its debts, and particularly the debts of the plaintiffs, and also asking for such other and further relief as would consist with equity and good conscience.

A demurrer to this bill was filed on the 6th of July, 1874. Upon the argument of the demurrer in December last, the court sustained the demurrer, and granted leave to the plaintiffs to amend their bill by the first day of January next following, the court being of opinion that it could not forfeit the franchise, that having been granted by the state, and that the state alone had the right to have the same forfeited; but the court stated, at the same time, that it would retain the bill and grant any equitable relief to which the parties were entitled; and, therefore, the bill was not dismissed, but leave given to amend. No controversy is made in this case but that the parties may have had a right to file a bill in the federal court, provided it was in the nature of a creditor's bill. The theory upon which the statute proceeds seems to be, that whenever a judgment is recovered, and remains unsatisfied for more than a year, no appeal or supersedeas being allowed, that of itself constitutes a legal insolvency of the corporation, and, authorizes an application for the relief named in the statute, namely, the appropriation of the assets of the corporation to

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the payment of its debts through a receiver. Therefore many of the allegations which are usually contained in a creditor's bill, and which have been considered necessary, are by the terms of this statute dispensed with; for example, the return of an execution *nulla bona*, before filing the bill.

In accordance with the permission given by the court on the 10th of December, when the demurrer was overruled, an amendment was filed to the bill on the 31st of December last. No question is made but that the bill as amended contains sufficient allegations upon which the court could grant equitable relief by the appointment of a receiver. Accordingly, on the application of the plaintiff, after this amendment was filed, a receiver was appointed, on the second day of January, 1875, who entered upon the performance of his duties, and took possession of the property of the defendant under the order made by the court. This possession was taken in a peaceable manner, without the use of any force; the parties who were in the actual possession at the time, upon the presentation of the order of the court, surrendering the property to the receiver of this court.

At the time the receiver was appointed by this court there was nothing in the pleadings or on the files of the court to show that there had been a receiver appointed by another court to take charge of the property, or that any such receiver was in possession of the same; the fact being, however, that a receiver had been placed in possession of the property by the order of the Wayne Circuit Court prior to the appointment of the receiver by this court, and it being claimed that the possession was taken by the receiver of this court without consent or acquiescence of the receiver of the Wayne Circuit Court. The Circuit Court of Wayne County directed the arrest of the receiver appointed by this court for an illegal interference with its own order, and thereupon the receiver applied to this court at Indianapolis for a writ of *habeas corpus*, on which the receiver of this court was brought before it and a statement made of the facts in the case.

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Inasmuch as it is conceded that the receiver appointed by this court was acting under an order duly made, and took peaceable possession of the property in pursuance of the order, no objection seems to be made by any of the counsel in this court to the discharge of the receiver from arrest; he is accordingly discharged. But the plaintiff in the suit in the Circuit Court of Wayne County has come before this court and alleged the filing of a bill or complaint, on the 10th day of November, 1874, and the appointment, on that day, of a receiver by that court and moves that the order made by this court appointing a receiver be rescinded, for the reason that there was a receiver of the state court then in possession of the property; and the question is whether this order should be rescinded, or should stand as an order properly made under the facts in the case.

It will be seen that the bill was first filed in this court. It was a bill asking the court to take possession of the property of the defendant, and to administer it for the benefit of its creditors. It is true that the bill asked, in addition to this, that the court should forfeit the franchise of the defendant; but the main object of the bill was to enable the plaintiffs to obtain payment, in whole or in part, of the judgment which they had obtained against the defendant. A declaration of forfeiture of the franchise would, of course, constitute no satisfaction of the claim which the plaintiffs had against it. The main purpose, therefore, of the bill was for the court by its receiver to take possession of the defendant's property. It is claimed this could not be done without a previous decree of forfeiture of the franchise. But the forfeiture of the franchise was only one of the prayers named in the bill, and which, so far as the plaintiffs were concerned, was immaterial. And it will be observed that the bill asks not only for the payment of their debt, but for the payment of the debts generally of the corporation, alleging that the assets of the corporation had become subject to the payment of its debts.

The demurrer was sustained on the ground that the allega-

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tions of the bill for the full relief asked on the part of the plaintiffs were defectively or imperfectly stated, not that there was no case made upon the bill, which, if properly stated, would entitle the plaintiffs to any relief. In other words, the court took jurisdiction of the controversy, although the allegations may be said to have been insufficient and imperfect.

The principle upon this subject is properly stated in the opinion of the Circuit Court of the Northern District of Illinois in the case of the Rockford, Rock Island & St. Louis R. R. Co.;¹ that the court which first takes cognizance of the controversy is entitled to retain jurisdiction to the end of the litigation, and incidentally to take the possession or control of the *res*, the subject matter of the controversy, to the exclusion of all interference from other courts of concurrent jurisdiction, and that the proper application of this principle does not require that the court which first takes jurisdiction of the controversy shall also first take the actual possession of the thing in controversy.

Then the question is as to the application of this rule or principle to the present case. It is insisted that, because the bill was amended, and, between the date of the filing of the bill and the amendment, another creditor instituted a suit in the state court and had a receiver appointed who took possession, therefore this court lost jurisdiction of the *res*, and could not permit the imperfect allegations to be amended, and thereby affect the assumed right of the state court over the *res*. The only question that arises in this aspect of the case is whether the federal court had jurisdiction; if it had, then the principle applies that no other court of concurrent jurisdiction could interfere with the *res*, which was the subject matter of controversy.

It is to be presumed that each court would equally protect

¹ *Ante* p. 197.

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the rights of the creditors of the defendant. But which court has first obtained jurisdiction, and has the right to call upon creditors to come before it for the protection of their rights? In deciding this question, we have to lay down a rule which would apply to both courts, state and federal; one by which we would be bound if the state court first obtained jurisdiction of the *res*, and by which the state courts should also be bound when the federal court has first obtained jurisdiction; and we are not prepared to hold that because the allegations in the bill are imperfectly stated, or because an amendment is made to the bill, that thereby the court loses jurisdiction of the subject matter. All amendments germane to the bill and allowed by the court, relate back to the time when the bill was filed, and are considered as incorporated into and a part of, the original bill. And it cannot affect the question that the amendment asks that the receiver shall do something else, as by adopting a change in the manner of administering the assets. We think that there is no other safe rule to adopt, in our mixed system of state and federal jurisprudence, than to hold that the court which first obtains jurisdiction of the controversy, and thereby of the *res*, is entitled to retain it until the litigation is settled. Where a bill is filed, the object of which is to obtain payment of a judgment or of a debt out of the assets of the defendant, if the assets are withdrawn from the court by another court, of course the object of the bill can never be attained; there is really nothing about which there can be litigation. The continuance, therefore, of a suit, under such circumstances, would be useless. The only relief that the party could have would be to follow the property to the other court. Whether or not in a race among creditors against an insolvent party, where bills are filed in courts of concurrent jurisdiction, and a receiver asked to take possession of the property, the receiver who first obtains actual possession can hold it without regard to the time when the court took jurisdiction of the case, is a very serious question. It was held by the Circuit Court of

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the Northern District of Illinois, in the case already referred to, that it was not material that a receiver appointed by the state court had first taken actual possession of the property provided the federal court had the prior right to control the *res*. We think that decision was correct; otherwise in the case supposed, where a bill is filed in one of the courts, and an application made for the appointment of a receiver, and the case presented, argued and considered, and a receiver appointed, at any time before the receiver takes actual possession of the property another creditor can go into another court, make his application, have the appointment made, and the receiver take possession of the property. This would seem to be in violation of the principle which has been so often sanctioned by the decisions, that that court which first takes cognizance of the controversy, and, incidentally, of the *res*, has the right to proceed and terminate the litigation.

This being so, it becomes simply a question of jurisdiction, not a question whether or not the case of the plaintiffs is perfectly stated. Defects can be supplied and the jurisdiction of the court not affected. Suppose that, upon an application to a court of equity for relief by a creditor against an insolvent estate, an omission were made to state in the bill that an execution was issued and returned *nulla bona*; if the fact warranted it, that defect might be supplied, and it would not affect the right of the court to proceed and give relief; so with the omission of any other allegation not affecting the question of the jurisdiction of the court over the subject matter. Of course, in all that has been said, it is assumed what was the fact in this case, that the bill was not only filed first in this court, but that the process was issued and duly served upon the parties, and that they were in court subject to its jurisdiction before any proceeding was instituted in the state court.

It is contended on the part of the counsel who ask that the court shall vacate the order made in this case, that this is like the case of *lis pendens*, and that the same principle applies as would apply there.

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It is well known that the application of that principle proceeds no further than this; that, whenever, upon the face of the record, by the institution of a suit and service of process it is shown that property or rights are to be affected, no one can deal with the property or those rights except subject to the suit; and if, after a person deals with the property, amendments are made upon the record, which show that the particular property with which he has dealt is affected, when the original record did not, that he is not bound by virtue of *lis pendens*; because, having dealt in good faith with the property, and there appearing nothing upon the records of the court to prevent any third party from dealing with it, the record cannot be amended so as to affect his rights, and it is for the reason that he is not at the time judicially informed of anything to prevent his dealing with the property.

We hardly think that the principle should apply to the case of a receiver. It is simply a question what court shall control the assets of the defendant in this case, and distribute them among creditors. A receiver has no right of ownership in the property. He is not a purchaser in good faith for value. He is simply the officer of the court, and therefore no rights of creditors or of third parties in any way are affected by refusing to allow another court to interfere with the *res*, which is the subject of controversy in the case.

We think, therefore, upon the whole, as we have already said, that the only safe rule to follow, in our mixed system, is that the court which first takes control of the controversy, (even although it may be by an imperfect bill, so that it gives jurisdiction of the controversy, and thereby of the *res*,) is entitled to maintain it to the end, without being disturbed by any other court of concurrent jurisdiction.

We therefore overrule the application made to rescind the order appointing a receiver in this case.

HOPKINS and BLODGETT, J. J., concurred.

In a subsequent case the above principles were re-argued before Judge Drummond, who adhered to the rulings in the foregoing opinion, as being satisfactory to himself and his colleagues — [*Reporter*.

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In re WILLIAM McEWEN & SONS.

DISTRICT COURT.—DISTRICT OF INDIANA.—FEBRUARY, 1875.

IN BANKRUPTCY.

1. JOINT AND SEPARATE ESTATE.—When a debt from one partner to a bankrupt firm was incurred by the consent or privity of the other partners, proof of the joint creditors against the separate estate will not be admitted in a court of bankruptcy.

2. SECTION THIRTY-SIX OF THE BANKRUPT ACT CONSTRUED.—When all the assets of a bankrupt firm are expended in the payment of costs, and there is no fund to be divided among the firm creditors, the firm and individual creditors must be paid *pari passu* out of the separate estate of each partner.

3. The fund applicable to and used in the payment of costs does not constitute a joint estate within the fair meaning of the Bankrupt Act.

The assignees filed a petition in the interest of the firm creditors, for the purpose of obtaining the instruction of the court upon the respective rights of the firm creditors of McEwen & Sons, and the individual creditors of William McEwen, one of the members of such firm alleging: 1st, that the firm assets would not more than pay the costs of settling the estate in bankruptcy; 2nd, that William McEwen was indebted to the firm, as appeared by charges upon the books, to an amount exceeding three hundred thousand dollars; that the firm debts amounted to over \$200,000, and William's individual indebtedness to over \$150,000, and that his separate estate was worth over \$200,000, and that his sons, who were his partners, had no more property than enough to pay their private debts; and that the only estate in the hands of assignees for distribution among creditors is the private estate of William McEwen.

The individual creditors appear in opposition to the petition, and file a demurrer thereto.

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Harrison, Hines & Miller, for assignee.

McDonald, Butler & Harrington, for individual creditors.

HOPKINS, J.—The question raised and discussed on the hearing was, whether upon the facts stated, the firm creditors were entitled to participate with the individual creditors in the distribution of the separate estate of William McEwen? In the first place, the assignees claim the right to prove the debt due from William to the firm, and in that way obtain a fund for distribution among firm creditors.

The petition does not show when the entries were made on the firm books, nor when the debt was created, nor does it show that William withdrew that amount, or any part of it, to defraud the firm creditors, or the members of the firm; nor does it show that the transaction was concealed from the firm, nor that it was not with the consent of all the members of the co-partnership. Neither fraud nor collusion of any kind is alleged.

Upon these facts does that balance constitute a debt in favor of the firm against that partner which the assignee of the firm can prove against him individually? I think, according to the authorities, it does not. The rule may now be considered as well settled, that when the debt from one partner to the firm was incurred by the consent or privity of the other partners, that proof of the joint creditors against the separate estate will not be admitted in a court of bankruptcy. If the party acted fraudulently or with a view to augment his separate estate at the expense of the joint creditors, a different rule would prevail.¹

¹ Story on Partnership, § 891; Gow on Partnership, 316; *Ex parte Smith*, 1 Glyn & Jamison, 74; *Ex parte Harris*, 2 Vesey & Beame, 210; *In re Lane & Co.* and *In re Boynton*, 10 Bankruptcy Register, 185.

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The principle upon which these cases rest is, I apprehend, that there can be no such thing as a debt between partners, or between an individual partner and his firm, in respect to partnership matters, until it is settled by a final winding up of the affairs of the firm; and bankruptcy courts have declined to go into such accounting upon the question of proof of debts in bankruptcy proceedings. So I must hold that neither the assignees of the firm, nor the firm creditors have a right upon this ground to prove this claim against the private estate of William McEwen.

There is something like an allegation in the petition that the partnership between William McEwen and his sons was a sham, and made simply for the benefit of William, and to enable him to carry on his private speculations.

It is doubtful whether this question can be raised at this stage of the case. They have been treated as partners and adjudged to be bankrupts, as such partners, on the petition of the joint creditors. I doubt the right of the joint creditors to now turn around and allege that they were not such in fact; but if this is not so, I do not think the allegation to that effect sufficiently direct and positive to warrant the court in holding the fact to be admitted by the demurrer.

It seems to be stated, inferentially, as the conclusion of petitioners from the other facts in the case, instead of an allegation of an existing fact.

This brings me to the consideration of the meaning of section thirty-six of the bankrupt act, and this is altogether the most difficult question in the case. The petition alleges that the firm have no assets after paying costs of settlement of estate to distribute or divide among the firm creditors, which is admitted by the demurrer and must be considered on this hearing as true.

If they have no assets, it has been settled, for this circuit at least, that the firm and individual creditors can be paid *pari passu* out of the separate estate.¹ The counsel for the

¹ *In re Knight*, 2 Bissell, 518.

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individual creditors contended that the allegation in the petition that the firm effects would not more than pay the costs was immaterial; that the question was, were there any firm assets; that if there were, it was unimportant whether they were to be applied to the payment of the costs or distributed among the firm creditors; that in either case the firm creditors would be excluded from participation in the separate estate of William McEwen until after the payment of his individual creditors in full; and that it was not essential that there should be a fund, exclusive of costs, to effect such result. If such is the meaning of the act, the firm creditors are without remedy, and may lose their whole demand, while the individual creditors of that member may get their pay in full.

The question is by no means free from difficulty. But after a thorough examination of the authorities upon the subject, I have arrived at a conclusion different from that contended for on the argument by the learned counsel for the individual creditors. In *In re Kahley*, 3 Bissell's Reports, 169, I held that the word "estate," as used in certain other sections, included the portion to be used in the payment of costs, as well as that to be divided among creditors. But the language of the portions of the act then under consideration differ materially from the language used in the thirty-sixth section. That section requires the assignee to "keep separate accounts of the joint stock or property of co-partnership, and of the separate estate of each member thereof, and then provides, that after deducting out of the whole amount received by such assignee, the whole of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to the payment of the creditors of the co-partnership, and the net proceeds of the separate estate of each partner shall be appropriated to the payment of his separate creditors." And it further provides that the residue of either estate, after the payment of the debts in the order above mentioned, should be divided among the creditors, firm or pri-

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vate, as the case might be. I think the expression "net proceeds," shows that Congress had reference to the estate to be distributed among the creditors, and only meant to exclude one class in case there were some funds for distribution in the class to which such creditors belonged, so that, when all the assets are expended in the payment of costs and there is no fund to be divided, as in this case, among the firm creditors, the firm and individual creditors are to be paid *pari passu* out of the separate estate of each partner. It then presents the case in the language of Judge Drummond in *In re Knight*, 8 B. R., 436, "that being the only source to resort to the payment of the debt of the firm, it should be appropriated as well to pay the debts due from the firm as from the individual members." What difference is there as to the firm creditors, between no assets and a case where assets are all used in payment of costs? If there is only property enough to pay expenses, they do not get anything; they have no source of payment except from the separate property.

So I think the just and equitable reading of the statute is that the creditors of a firm are excluded from participation in the separate estate of the members only when there is a fund to be distributed to them, to the exclusion of the individual creditors; that when neither has any advantage in a fund not alike applicable to both, they stand equal, and must be paid *pro rata*. In Story on Partnership, section 380, it is stated that, "if there is any joint estate, however small it may be, if it is an available joint fund, and not purely a desperate and nominal joint fund, then the joint creditor is excluded; as, for example, if the joint fund is absolutely worthless from the expenses of any attempt to get it in, or if it is pledged beyond its real value, it will be deemed a mere nullity.

I think this language plainly indicates that a joint fund, to exclude the firm creditors, must be beneficial to them. If it costs more than it comes to to get it, it is in no sense an available joint fund within the authorities. The Lord Chancellor

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in *Ex parte Peake*, 2 Rose, 54, where the answer to the petition of the firm creditors was that there were joint effects of £1 11s. 6d., said that joint effects to the value of five pounds or five shillings would be an answer to the application, but if the property alleged to exist was in such a situation that any attempt to bring it within the reach of the joint creditors must be deemed a desperate, or in point of expense an unwarrantable attempt, that would authorize a departure from the rule, and allow said creditors to prove notwithstanding such property. And Lord Chancellor Eldon, *Ex parte Hill*, 5 Bosanquet & Puller, note 191, says, "joint effects means such as are under the administration of assignees to distribute." In *Ex parte Janson*, 2 Maddocks' Chancery, 123, it is said, "The principle being that while there is any other fund, however small, to resort to, the joint creditors can not prove against the separate estate of one of the parties who has become bankrupt."

These cases were decided under the English bankrupt law, which was similar in the respect under consideration to our own, and, therefore, are important as showing that the English courts recognize the exception to the statute rule in cases where there is no joint fund to resort to, or that is available to the joint creditors, and are very important in settling the proper construction of the section of the bankrupt act under consideration. That section lays down the general rule, as contended for by counsel for individual creditors, but it is to be regarded as subject to the exceptions above stated, and I think the facts, alleged in the petition bring this case within the doctrine of these authorities and exceptions.

The counsel for the individual creditors referred to *Ex parte Kennedy*, 19 English Law and Equity, 150, as laying down a different rule. That case does not appear to be supported by authority. The decision is based upon *In re Bridge and S. & G. Keale*, referred to in note. It does not appear that the court in that case decided this question. No opinion is given; simply the order of the court, and it might

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have been based upon the fact that there was other property besides, to wit.: the "brig" therein mentioned, and so not have turned upon the question of costs, as claimed. But without further notice of that case as it is in conflict with the general current of English cases, I cannot adopt its conclusions.

The case of *Warren*, Ware's Reports, 229, cited to same effect by counsel, does not show that this question was raised, and therefore furnishes no support to this claim. I am also supported in my conclusion by the case of *In re Jewett*, 1 Bankruptcy Register, 130, quarto; *In re Downing*, 3 do., 182; Bump on Bankruptcy, 188 and 189. As before stated, I have assumed the fact that the whole joint estate will be used in payment of the costs of the proceedings in bankruptcy, leaving no joint fund for distribution, nor any funds to be marshaled. I have, as before stated, with considerable hesitation, come to the conclusion that the fund applicable to and used in the payment of the costs of the proceedings does not constitute a joint estate within the fair meaning of the bankrupt act, so as to deprive the firm creditors of participating with the individual creditors in separate estate. To hold that a fund used in payment of necessary costs is to have the same effect upon the joint creditors' rights as if distributed among them, is, in my judgment, a very unjust and unreasonable conclusion, and I cannot adopt it.

I, therefore, overrule the demurrer, with leave to the respondents to put in an answer within twenty days after notice of this decision. If they fail to do so, I direct an order to be entered that the individual creditors of William McEwen, and the firm creditors of McEwen & Sons be paid *pari passu* out of the separate estate of the bankrupt William McEwen, in the hands of the assignees in this case.

JAMES IRONS vs. THE MANUFACTURERS' NATIONAL BANK OF CHICAGO.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—FEBRUARY, 1875.

IN EQUITY.

1. NATIONAL BANK—RECEIVER.—The power conferred by the banking act upon the Comptroller of the currency, to wind up the affairs of a national bank in certain contingencies, does not exclude the authority of a competent tribunal to appoint a receiver in other cases. In cases not within the special provisions of the Banking Act, a national bank may be proceeded against in the same manner as any other debtor or corporation.

2. *Kennedy vs. Gilson*, 8 Wallace, 498, commented on.

3. INSOLVENT CORPORATION—MARSHALING ASSETS.—The proper remedy against an insolvent corporation when its assets are of such a nature that they cannot be levied upon and sold under execution, is a bill in equity to marshal and distribute its assets.

4. ACT OF INSOLVENCY.—The term "act of insolvency," in the fifty-second section of the Banking Act, means any act which would be an act of insolvency on the part of an individual banker, not simply such an act as authorizes the Comptroller, under the banking act, to appoint a receiver.

5. PREFERENTIAL PAYMENTS.—Where the officers have been making preferential payments, a court of equity, on the application of a depositor, will appoint a receiver.

Gardner & Schuyler, for complainant.

J. Hutchinson and Tenneys, Flower & Abercrombie, for defendant.

BLODGETT, J.—This is a creditor's bill, setting forth in substance that the complainant was a depositor in the Manufacturers' National Bank; that, at the time the bank closed its doors in October, 1873, he had a large sum deposited

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there; that the bank has since that time gone into voluntary liquidation, or pretended to do so; that it has withdrawn its bonds on deposit with the treasurer of the United States, and has since that time in some manner, through the agency of various officers, converted its funds, under the pretexts of paying portions or some of its debts, and that in the meantime the complainant has brought suit against the bank, and recovered judgment in this court for the amount of his debt, —something over \$12,000,—issued his execution, and been unable to make anything. He charges that the officers of the bank have fraudulently applied the funds of the bank to the payment of other persons than himself; that they have made fraudulent settlements and dispositions of the property of the bank; and there is no property subject to seizure or execution which the complainant can obtain by proceeding at law, and asks for the discovery of whatever assets the bank or the officers of the bank may now have under their control belonging to the bank, and for the appointment of a receiver to take possession of these assets; and also, that the adjustments or settlements which have been made by the officers of the bank, which are fraudulent, and in violation of the provisions of the banking law under which the defendant was organized, shall be set aside and held for naught, and the property equally distributed among all the creditors alike.

The bill does not show the fact, but an exhibit filed with the bill, shows that within the last few months certain creditors of the bank have applied to the comptroller of the currency, under the provisions of the general banking law of the United States, asking that he appoint a receiver for this bank under the provisions of that law, and pursuant to it, for the purpose of winding up its affairs, and the comptroller has responded to that request by the statement, in substance, that some time in the early part of January, 1874, the bank deposited Government notes with the treasurer to the amount of its circulation, and took up its bonds; and that the relations between the bank and the department of the comptroller of cur-

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rency from that time on have ceased, and the comptroller now has, or claims that he has, no authority to appoint a receiver; that he has no official notice of any protest of any of the circulating notes of the bank, and thinks that he has no authority to appoint a receiver.

The defendant files a general demurrer.

It would seem from an examination of the banking law, that the comptroller of the currency has no authority to appoint a receiver except in certain contingencies, such as the failure to make good a reserve, the failure to redeem circulating notes on demand, the failure to make good the capital stock, whenever the same becomes impaired, and the failure to meet certain other requirements of the banking law. Now, neither of these contingencies are charged in this bill to have occurred, and it is only in the case of such contingencies that the comptroller acquires the right to appoint a receiver.

It is claimed on the part of the defendant, and has been very strenuously and ingenuously argued, that there is no power in any court to appoint a receiver for this bank, because the delegation of the power to the comptroller of the currency to appoint a receiver in certain contingencies to wind up the affairs of the bank excludes the authority of any other tribunal or person to appoint a receiver. I have carefully examined the banking law, and the decisions of the Supreme Court, and those of various states made since this banking law took effect upon the various questions which have arisen, and do not find that this precise question has ever been made. But I can see nothing in the law itself, nor in the decisions of the courts upon the law, so far as they have gone, to exclude the idea that a corporation created as this is under an act of Congress for certain specific purposes, does not come within the general provision of the law regulating the remedies of creditors as against this corporation as much as against any other corporation, except where there are specific provisions to meet those cases. For instance, a holder of the circulating notes of the bank, who had presented them

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for payment, and payment had been refused, would undoubtedly find this remedy within the special provisions of the banking law itself, because there is a specific provision meeting that case, and his remedy would undoubtedly be found in the action of the comptroller of the currency. But there are many cases like the one before us, where the bank may not have so violated any of the provisions of the banking law as to call for the appointment of a receiver by the comptroller.

The allegations in this bill are very full that this bank was insolvent at the time it closed its doors, and has been ever since; that it failed to pay its debts; that a large amount of its debts are still unpaid; and the question is, what remedy have the creditors of this bank if a court of equity cannot take on itself the administration of its affairs, where the banking law does not provide that it shall be done by the comptroller of the currency? It is true that in the case of *Kennedy vs. Gibson*, 8 Wallace, 498, the Supreme Court state that the provision of the banking law making the stockholders liable for the debts of the corporation to the amount of the stock held by them respectively, could not be enforced except under the action of the comptroller through a receiver appointed by him. Whether that opinion will be found to entirely express the full meaning and intention of the Supreme Court whenever they come to examine it in the light of future cases and facts which may be brought before it, is at least a matter of doubt. I do not feel sure that the Supreme Court will adhere to quite as broad a statement as is made in that case; but still they may. But even that does not oust the jurisdiction of a court of equity to take hold of whatever assets the bank may have aside from the personal liability of the stockholders, and administer those as it would the affairs of any insolvent corporation.

The law is well settled in this state and in the courts of the United States, that the proper remedy of a creditor against a corporation, when the assets are of such a nature that they cannot be levied upon and sold on execution, is by a proceed-

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ing in equity to marshal and distribute the assets. It is unnecessary to cite authorities upon that question. The law, I think, is as well settled as any branch of the law can be considered settled in this country.

The general banking law provides, by the fifty-second section, "That all transfers of the notes, bonds, bills of exchange, and other evidences of debt owing to any national banking association, or of deposits to its credit; or assignment of mortgages or sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion or other valuable things for its use, or for the use of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by this act, or with a view to the preference of one creditor to another, except in the payment of its circulating notes, shall be utterly null and void."¹

Now by the fiftieth section of the banking law it is provided in substance that, after making provision for the payment, or rather indemnification, of the Government for the redemption of the circulating notes of a national bank, all the remainder of the proceeds of its assets shall be divided *pro rata* among its creditors, share and share alike, according to the amount due to each. And the section which I have just read makes void all payments and settlements which are made to one creditor, to the exclusion of other creditors, after the commission of an act of insolvency.

The allegations in this bill, which are confessed by the demurrer as true, show that the bank became insolvent, closed its doors, and, I think, was guilty of an act of insolvency within the meaning of the banking law—the organic act of incorporation.

It was urged by defendant's counsel that the only act of in-

¹ U. S. Revised Statute, 1874; § 5242.

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solvency contemplated by this fifty-second section, was such an act of insolvency as authorized the comptroller to appoint a receiver, that would be merely the failure to pay its circulating notes, and that a failure to pay a depositor, or its bills of exchange, or notes, or drafts, would not be an act of insolvency.

It can hardly be possible that Congress intended to give all the remedies in the banking law merely to the note-holder of these national banks, and leave depositors and general creditors entirely unprovided for. It must have been in the contemplation of Congress in the enactment of this act, that these national banks could receive deposits, because they are specially authorized to do so; that they would issue bills of exchange, and be otherwise liable to individuals and corporations, because there is express provision in various sections for payment of that class of indebtedness. And I think the term, "act of insolvency," mentioned in the fifty-second section, is clearly an act which would be an act of insolvency on the part of an individual banker; that is, the closing of the doors, refusal to pay depositors on demand, refusal to go on in the due course of business to transact its business as a bank, and discharge its liabilities to its creditors.

So that upon the allegations in this bill, which are, as I said before, admitted to be true by the demurrer, it would seem that this bank has been making preferences in direct contravention of the provision of the banking law for a year past. How far a court of equity will deem it its duty to disturb these transactions, and require repayment from parties who have received payment from the officers of the bank in the course of liquidation of its affairs, is a matter for future consideration. But it certainly furnishes the ground for the intervention of a court of equity, it seems to me, when it is made to appear that a bank is going on and paying some creditors to the exclusion of others. It was the plain intention of the banking law that all creditors should share equally, and that no preference should be allowed in favor of one cred-

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itor as against others; that the United States Government, as the guarantor of the circulating notes of the bank, is the only party that is entitled to any preference whatever; that all other creditors are to share alike. And, therefore, it would seem to follow that, if a bank is not in a condition to pay all its creditors, it can only pay them *pro rata*,—that it has no right to pay a part in full and have others unpaid.

Entertaining these views, and without taking longer time to explain my views upon the question, it is sufficient to say that I think a case is made by the bill for an appointment of a receiver.

J. D. Harvey was accordingly appointed receiver under a bond of \$100,000.

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for the purpose of avoiding the auditing of the plaintiffs' judgments. If they had, in addition to the allegation of their own resignation, alleged that their successors had been duly qualified and accepted the offices, they would of course have shown that they were no longer responsible, as the principle clearly deducible from the township organization law, as it now stands in this state, is that when once a town officer is elected, and accepts the office and qualifies, he remains such officer until his successor is appointed, either by election or by appointment. Until his successor is appointed and qualified, and is ready to take possession, he is such officer. Mr. Badger and these other officers, according to their own return made in this case, were duly elected to the various offices of this town; they acted as such; they qualified as such, and continued to act up to the time that they found they were obliged to either audit these judgments of the plaintiffs or resign, and they resigned, evidently, to avoid the auditing of the plaintiffs' judgments. It was an expedient resorted to by these town officers, apparently to avoid the levying of taxes and to enable the property-owners of this town to escape the payment of taxes that should have been levied to liquidate the plaintiffs' demands.

Now the question is, have they evaded it by their resignations? I think they have not. I think that these men, being still town officers of this town,—their places not having been filled,—are still bound to proceed and audit these claims. The law requires that this board of town officers shall meet twice a year, on the Tuesday preceding the annual town meeting, and on the first Tuesday in September, being the Tuesday preceding the time fixed by law for the regular annual meeting of the board of supervisors.

I am not disposed to require them to hold any special meeting; the Tuesday preceding the annual town meeting will soon be here. I think the *mandamus* should require the board of auditors to meet and audit these judgments at that time. I have no doubt of the right of the court to require

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them to meet at some other time,—some time previous to that,—but nothing would probably be gained, as the tax cannot be levied now until another year. The *mandamus* will therefore issue, requiring these respondents to audit these judgments at the regular meeting of the auditing board on the Tuesday preceding the annual town meeting in April next.

The demurrer to the answer will be sustained, and an order made for a peremptory writ of *mandamus*.

It was held upon application for a writ of *mandamus* against a city to compel the authorities thereof, to levy and collect taxes for the purpose of paying a judgment, that such available means as are at the disposal of a city, raised under the taxing power, and without diverting the funds from their original purposes as specified in the charter, should be applied to the payment of the judgment. *The People vs. City of Cairo*, 50 Illinois, 154; a writ of *mandamus* will lie to a board of school directors, commanding the assessment and levy of taxes to pay a judgment against a school district. *Beverly vs. Sabin*, 20 Illinois, 357.—[*Reporter*.

Jenkins, Assignee, vs. Armour.

**ROBERT E. JENKINS, ASSIGNEE OF THE COMMERCIAL
INSURANCE COMPANY, OF CHICAGO, vs. JOSEPH F.
ARMOUR.**

**DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS—FEBRU-
ARY, 1875.**

1. **STOCK NOTES IN INSOLVENT COMPANY—SET-OFF.**—A stockholder in an insurance company rendered insolvent by a fire cannot escape his liability on a stock-note, by presenting a certificate of indebtedness on one of the adjusted policies and withdrawing his note.

2. **TRUST FUND.**—Such a note constitutes a trust fund for the benefit of the creditors of the company, and the transaction is in effect a conversion of the company assets.

3. **INTEREST.**—The stockholder must pay interest from the date of the withdrawal of his stock-note.

These were seven suits against as many different defendants, on stock-notes given to the company. At the time of subscribing for the stock each stockholder paid twenty per cent. in cash and gave his note to the company for the balance, without interest, payable upon demand when needed to pay losses. The dividends from time to time declared by the company had been applied upon these notes, until, at the time of the great Chicago fire of October 9, 1871, there was only thirty-five per cent. remaining unpaid on the notes.

Soon after this fire, each of these defendants purchased policies from other persons, and procured their adjustment by the company, taking certificates of loss for the amount, which certificates they then surrendered to the treasurer at par in payment of their stock-notes.

Hutchinson & Luff, for assignee.

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Upton, Boutell & Waterman, for Armour. •

BLODGETT, J.—There can be no doubt that each of these defendants, at the time of the transactions alleged, knew of the insolvency of the company, and dealt with it upon that basis. The object of each of them was to obtain payment to themselves in full of their claims, notwithstanding the fact that such payment would be a withdrawal of the assets of the company from other policy-holders; for these notes against the several defendants were in effect cash, and the amount thereof should have been paid in cash into the treasury of the company for distribution among the creditors. The defendants were all responsible, and the contingency having arisen when the cash was needed upon these notes to pay losses, it became their duty to pay it into the company.

Following the law, then, as laid down in *Hitchcock vs. Rollo* and *Sawyer vs. Hoag*, decided by Judge Drummond in this court, 3 Bissell, 276, 293; and in the latter case as decided in the Supreme Court, 17 Wallace, 610, there can be no doubt but that such surrenders and transfers were a fraud, and such a fraud as would be set aside by the court without special reference to the provisions of the bankrupt law. The stock-notes were a part of the capital stock of the company, and as such were a trust fund for the creditors, and by collusion with the officers of the company, the defendants withdrew them from the treasury. The fact that some of the defendants were also officers of the company made no difference, and those who were only stockholders are equally liable.

An important question, and one not easy of solution, arises as to the time when interest should begin to run on these stock-notes, whether from the date of demand by the assignee, or of the exchange by the stockholders of these certificates for their notes. As against the company, if it had continued solvent, interest would only run from the time of a proper demand; but in these cases the liability of the defendants

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arises from their own acts under circumstances where they are properly chargeable as trustees. They, in fact, wrongfully converted to their own use the assets of the company at the time when they made these exchanges. They received payment of debts in full from the company when they knew it to be hopelessly insolvent, and withdrew from the treasury of the company their notes, which were valuable assets. The effect is the same as though they had taken and converted the amount in cash from the coffers of the company, and therefore they come within the rule that a trustee must pay interest from the date of conversion.

Judgment for plaintiff in each case, with interest at six per cent. from date of withdrawal of stock-note.

A stockholder indebted to an insolvent corporation for unpaid shares, cannot set-off against this trust fund for creditors, a debt due him by the corporation. The fund arising from such unpaid shares must be equally divided among all the creditors. *Sawyer et al. vs. Hoag Assignee, etc.*, 9 Bankruptcy Register, 145; a debt of one, insolvent, purchased by his debtor, immediately prior to the filing of a petition in bankruptcy, and purchased in order to set the same off against his indebtedness, is protected by the Bankrupt Act; it only forbids the set-off of claims purchased after the petition is filed. *Hovey et al. vs. Home Ins. Co.*, 10 do., 224.—[Reporter.

In re Coan & Ten Broeke M'f'g Co.

In re COAN & TEN BROEKE CARRIAGE MANUFACTURING COMPANY.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—MARCH, 1875.

IN BANKRUPTCY.

CONSIGNOR—LIEN.—A consignor whose property was sold prior to the bankruptcy, and the proceeds mingled with the general assets, has no lien or specific claim against the estate; he can only share with the other creditors.

This was a petition by B. Manville & Co., and other creditors of the bankrupt, seeking to establish a trust fund, and asking payment in full of their claims from the money in the hands of the assignee.

The bankrupt, a corporation doing business in the city of Chicago, as a manufacturer and dealer in carriages, was in the habit of receiving carriages on consignment from other manufacturers and dealers, keeping an open account with each one of them, selling for cash and on credit, or exchanging for material, and sometimes also paying in material. At the time of the bankruptcy, they were indebted to some of the petitioners for carriages thus sold, and among the stock coming to the hands of the assignee, were other carriages thus sent on consignment, all of which, however, were sold by the assignee, there being nothing at the time to indicate that they were not the property of the bankrupt, and the consignors having made no claim to any specific carriages. The proceeds of such as had been sold prior to the bankruptcy had not been kept as any special fund, but had gone into the general assets of the corporation.

In re Coan & Ten Broeke M'f'g Co.

F. C. Ingalls, for petitioners.

BLDGGETT, J.—The controlling question in this case is, whether the proceeds of these consigned carriages came within the clause in the 14th section of the bankrupt act, which provides that “no property held by the bankrupt in trust shall pass by such assignment.” It is true that in examining the text-books and cases on the subject of trusts, we find many expressions like these, that a factor or agent is a trustee for his principal, that a bank is a trustee for its depositors, and even that a debtor is a trustee for his creditor. The courts of New York and Massachusetts have frequently decided cases upon these principles, and, founded upon such expression, the counsel for petitioners has framed his argument, that they have a lien upon these proceeds as a species of trust fund, and are entitled to payment, to the exclusion of the general creditors of the bankrupt.

A proper construction, however, of this clause in the bankrupt act, will only apply it to property still held in specie, and which can be distinguished from the other property of the bankrupt, or where the proceeds constitute a separate and distinct fund, not to cases where they have become mingled with the general assets of the bankrupt, even by his wrongful act.

Here there is no consigned property in the hands of the assignee which the petitioners can claim as belonging to themselves, nor any distinct fund which can be recognized or traced as the specific proceeds of the property sent on consignment by these petitioners.

The petition must, therefore, be dismissed.

In re Wright.

In re JOHN S. WRIGHT.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—MARCH,
1875.

IN BANKRUPTCY.

1. **STATUTE OF LIMITATIONS—HEIRS.**—Where a debtor had filed a petition in bankruptcy, his only debts being apparently barred by the statute of limitations, his widow and heirs cannot procure a withdrawal of the property from the bankruptcy court, even though no debts had been proved against the estate. They may have been taken out of the statute, and if provable at the time of filing the petition they would not be barred subsequently. The statute ceases to run on the filing of the petition.

2. **DELAY OF CREDITORS.**—The heirs of the bankrupt cannot profit by delay of creditors in proving their debts: and the widow of an intestate has no possible standing in court, her dower claim not passing to the assignee.

Van Arman & Felch, for petitioners

J. E. Lockwood, assignee, *pro se*.

BLODGETT, J.—In this case the widow and children of the bankrupt have filed their petition, setting forth that the bankrupt filed his petition in this court and was duly adjudicated a bankrupt on the second day of March, 1868; that he scheduled interests in certain real estate of which he claimed to be seized at the time of filing his said petition in bankruptcy; that an assignee was appointed to whom all his estate was duly conveyed; that no debts have been proven against said estate, and no sale or disposition of the property assigned has been made by the assignee; that the bankrupt was duly discharged from his debts pursuant to the provisions of the bankrupt law; that said John S. Wright, died intestate in

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September, 1874, leaving petitioners his widow and heirs-at-law.

It is further stated in the petition that all the debts contracted by the bankrupt, and from which he sought to be discharged by this proceeding in bankruptcy, were contracted more than sixteen years ago, and are barred by the statute of limitations of this state.

The petitioners then pray that the assignee may be required to reconvey the property of the estate to them as the proper representatives of the bankrupt.

On filing petition, a rule was entered, requiring assignee to show cause why the prayer should not be granted. The assignee answered stating in substance, that the extreme paucity of assets at the time said proceedings were prosecuted was such that there was no good reason to expect any dividend from said estate to creditors; that the bankrupt had at times prior to his bankruptcy, been possessed of large and varied interests in real estate in Cook County, Illinois, and elsewhere, all of which had, however, at the time of such bankruptcy, been conveyed away or mortgaged, or otherwise incumbered to their full value, and if for any reason such interest should at any time be found valuable, the benefit thereof should be given to the creditors.

It is contended on the part of the petitioners that, inasmuch as no debts have been proved, and as all the debts against the bankrupt's estate are now barred by the statute of limitations, therefore no debts can hereafter be proved, and the heirs of the bankrupt are entitled to a return of the property; in other words, that the estate stands precisely as though all the debts had been duly proved and paid, and there was a remnant or surplus of assets left in the hands of the assignee.

The argument seems to me more specious than sound. It does not follow that because sixteen years have now elapsed since the debts were contracted, they are therefore barred by the statute of limitations. Many or all of them may be in judgment, or on specialty, or a new promise to pay them, or an

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acknowledgment of their being unpaid, made just on the eve of bankruptcy proceedings, all which would take them out of the statute. And of existing debts to which the statute could not have been pleaded by the assignee if the creditors had sought to prove them at the time the proceedings were commenced, I apprehend they have not been barred by any time that has elapsed since the schedule was filed. If barred by the statute when proceedings were commenced, the assignee could probably have pleaded the bar, but if valid debts at that time, I think they must remain so as against the assignee, although I cannot find that this precise question has ever been determined. The case is analogous to a trust. Here is property placed in the hands of a trustee for the benefit of certain persons. When the assignee has converted it into money and is ready to distribute it, he is to call a creditors' meeting for the purpose of making a dividend. Until that time the beneficiaries are not required to act. They need not prove their debts until there is something to divide, and their status in regard to the right to a dividend is fixed by this right at the time the proceedings commenced.

Suppose, for instance, a bankrupt schedules a claim which is within one day of being barred by the statute, and suppose the whole term to have elapsed when the creditor comes forward to prove his claim, could the assignee be heard to allege that the bar which commenced to run before bankruptcy had ripened afterwards? I think not, but that if the claim is provable when the proceedings are commenced it must remain provable. True creditors may forfeit their rights as against each other by their neglect;—that is, those who have proven their claims may come in and share all the dividends as against those who neglect to prove. But the bankrupt or his heirs has no right to profit by the delay of the creditors in proving their claims. As long as there are creditors unpaid the bankrupt has no right to demand the property. It is true that the mere statement of a debt by a bankrupt in his schedule, does not make it provable nor take it out of the

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statute of limitations. If there is any defense to a claim, the assignee or another creditor can assert it, although the bankrupt has in one sense admitted it by his schedule.

So, too, no person can be recognized as a creditor, except one who has proved his claim, but this rule is only applicable to the relations of creditors to each other, and the assignee and not to the bankrupt.

Cases may readily be imagined where creditors, by waiting longer than those of this bankrupt have waited, may be paid in full from the proceeds of property which was apparently valueless at the time the schedule was made.

The bankrupt has accomplished the main purpose for which he came into the court. He has obtained his discharge, and it does not befit his heirs to dictate what creditors shall do about proving their debts, nor when the assignee shall convert the property. That is a matter entirely between the creditors and the assignee. They can put him in motion at any time, or they can allow him in the exercise of his own judgment to await events.

The counsel for the petitioner ask how long they must wait for these debts to be proven? I answer: This is not a matter in which they have any concern, and the time they must wait is of no consequence to creditors.

I do not see what standing Mrs. Wright, the widow, has in any event on this petition. Her husband died without a will. She is only entitled to dower, and that will not pass to the assignee. She is not delayed, and therefore has no right to relief here.

United States vs. Southmayd.

UNITED STATES vs. LD. SOUTHMAYD.

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—MARCH,
1875.

1. **LIST OF WITNESSES FOR ACCUSED.**—In all criminal cases in which there has been no preliminary examination, it is within the discretion of the court to order a list of the witnesses sworn before the grand jury, to be furnished to the accused.

2. **MINUTES OF GRAND JURY.**—He is not, however, entitled to the minutes of the proceedings before the grand jury, nor, in the absence of strong reasons to the contrary, should they be furnished him.

The defendant was indicted for the alleged forgery of a postal money order, and for passing such order. There was no preliminary examination previous to the finding of the indictment. The defendant's counsel moves for an order requiring the district attorney to furnish him with a list of the witnesses sworn before the grand jury and with the minutes of their testimony, basing his application upon the fact that there was no preliminary examination, and claiming that he is entitled to know who the witnesses were who appeared before the grand jury and what their testimony was, in order to prepare for trial. The application, so far as it relates to the production of a list of the witnesses, is not resisted, but opposition was made to disclosure of their testimony.

Levi Hubbell, U. S. District Attorney, for the United States.

J. G. Jenkins, for defendant.

DYER, J.—There are cases reported in the books in which the courts, in the exercise of a proper discretion, have ordered

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a list of the witnesses to be furnished to the accused where he has had no preliminary examination before a magistrate. The statutes of the United States provide that when any person is indicted of treason, or of any other capital offense, he shall be furnished with a copy of the indictment and a list of the witnesses to be produced at the trial.¹ I find no similar provision in relation to other offenses. I have no doubt, however, that in all cases in which there has been no preliminary examination, it is within the discretion of the court to order a list of the witnesses sworn before the Grand Jury to be furnished to the accused. *The People vs. Naughton*, 7 Abbott's Practice Reports N. S. 421, is relied upon by counsel for defendant as an authority in support of his motion, not only as to furnishing a list of witnesses, but as bearing upon his right to the minutes of their testimony. In that case the defendants were indicted for alleged frauds in the conduct of certain elections. The motion papers set forth that the accused were indicted without preliminary examination; that they had no means of knowing the particular time, place or circumstances relied on by the people; that, at different times during the day on which the charges were laid, a large number of persons were present at the voting place, and, unless the accused could ascertain the precise time at which they were charged to have committed the offenses, it was impossible for them to determine what witnesses to summon, or in any manner to prepare for trial; and that important irregularities occurred in the proceedings of the Grand Jury, fatal to the validity of the indictment, which the minutes of testimony would disclose. Most of the discussion, in the opinion of the court in that case, is addressed to the question of the right of the accused to a list of the witnesses. The case discloses that it had been customary in many of the counties of the State of New York, before the passage of any

¹ United States Revised Statutes, 1874, Title 13, Ch. 18, § 1033.

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statute on the subject, for the District Attorney to indorse the names of witnesses on an indictment, and then send the same to the grand jury to be investigated. The names of the witnesses came, therefore, to be regarded as much an indorsement as the words, "True bill," and, consequently, the statute subsequently passed provided that the accused should be entitled "to a copy of the indictment and of all indorsements thereon." We have the same provision in the statutes of this State. Upon the practice as it had grown up in New York, and upon the statutes, there can be no doubt of the correctness of the decision of the court in *The People vs. Naughton, supra*, requiring a list of witnesses to be furnished.

The case of *Commonwealth vs. Knapp*, 9 Pickering, 496, so far as it is applicable here, presented only the question of the right of the accused in a capital case to a list of the witnesses for the state. Although it was urged that this was not a matter of right, except under the statute of treason, WILDE, J., says, "a list of the witnesses has never been refused, in a case of this kind."

If the determination of the question, now presented, depended upon authority, I do not regard the case of *The People vs. Naughton, supra*, as settling the point. It is not asserted here that any irregularities occurred in the proceedings before the grand jury, involving the validity of the indictment. In that case, the application for the minutes of testimony was based principally upon such alleged irregularities, claimed to be fatal to the indictment, and which the minutes would disclose, and this branch of the motion was denied, for the reasons that the motion papers did not state wherein the proceedings of the grand jury were irregular, or wherein an inspection was essential to protect the rights of the defendant, or that he could not more properly derive the information sought from other sources. The strictness of the rule on the subject was rigidly enforced, and the court say, p. 432, that "it is only within certain restrictions that any in-

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spection of the minutes can be allowed."

In Earl of Shaftesbury's case, 3 Howell's State Trials, the court, on application, ordered the witnesses before the grand jury examined in open court. But that was a case where an attempt was made to procure an indictment for high treason against the Earl.

It is the general rule that the proceedings before a grand jury are privileged from disclosure. The cases are exceptional in which the rule is not adhered to. In an action for maliciously indicting the plaintiff, Lord Kenyon allowed a grand jurymen to be asked whether the defendant was the prosecutor of the indictment; and thought the disclosure did not infringe upon the jurymen's oath.¹ In that case the alleged cause of action itself sprung from the act of the party in procuring the indictment.

Following the general rule, it is held that the clerk of the grand jury cannot be compelled to disclose the proceedings before them, nor can the county attorney.² In Massachusetts it has been held, that the attorney for the commonwealth cannot be called to disclose what passed in the grand jury room.³

In the absence of strong reasons to the contrary, the rule ought not to be departed from. I think it should be adhered to in this case, to the extent of denying the application for the minutes of testimony. A list of the witnesses sworn before the grand jury should be furnished to the defendant.

¹ Roscoe's Criminal Evidence, 150.

² *McLellan vs. Richardson*, 13 Maine Reports, 82.

³ *Commonwealth vs. Tilden*, 2 Starkie on Evidence, 824, note.

Town of Lake vs. Hequembourg.

TOWN OF LAKE vs. CHARLES E. HEQUEMBOURG.

**CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—MARCH,
1875.**

IN EQUITY.

NINTH ARTICLE ILLINOIS INCORPORATION ACT.—To constitute an adoption of this article, it is only necessary that it be adopted by such a declaration of the municipal authorities as indicated the will of the corporation, it is not necessary that it be by vote of the people.

On the sixth of February, 1874, the board of trustees of the Town of Lake, by a vote of four out of five members constituting the board, entered into a contract with Charles E. Hequembourg, for the laying of water pipes in the streets of the town, without advertising for bids. The work under the contract was performed during the summer and fall of 1874, and payments were made from time to time by the town upon estimates presented by the contractor. After the execution of the contract a change took place in the membership of the board of trustees, and in November, 1874, a bill was filed by the town seeking to annul the contract, setting up that the town had no power to enter into the contract without first advertising for bids as required by section one of the act of April 15th, 1873, Revised Statutes of 1874, p. 250, and that the contract had been corruptly and fraudulently entered into by the former board of trustees.

The defendant answered denying fraud, and alleging that the contract was entered into by the town under the powers conferred by article nine, of the general law for the incorporation of cities and villages, approved April 10, 1872, and in

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force July 1, 1872. The defendant also filed a cross bill, praying that an account might be had between the town and himself, and that a decree might be entered in his favor for the amount found to be due him upon such accounting. Upon the part of the contractor it was contended that the contract was executed in conformity with the requirements of section 50, of article nine, above mentioned, which provides that a contract may be entered into without advertising for bids by a vote of two-thirds of all the trustees elected. On the part of the Town it was contended that all contracts, in regard to water-works, must be let under the act in regard to water-works approved and in force April 15, 1873, which requires all contracts to be let to the lowest bidder after three weeks notice by publication in a newspaper.

It appeared from the evidence that the board of trustees of the Town of Lake, by an ordinance passed in 1872, adopted article nine, above mentioned, as a part of the organic law of the town, and that no vote of the people was ever taken upon the subject. Three main questions were presented for the consideration of the court:

1st. Whether the execution of the contract was secured by fraud or corruption.

2nd. Whether the board of trustees had power to adopt article nine without a vote of the people of the town.

3rd. Whether the power to make contracts in regard to water-works, conferred by article nine, was repealed by the act of April 15, 1873, in regard to water-works.

Bennett, Kretzinger & Veeder, for Town of Lake.

John P. Wilson, for Charles E. Hequembourg.

DRUMMOND, J.—The first question presented in this case is whether there was fraud in the making of the contract. The rule is well settled that fraud is never to be presumed, and there is no evidence offered from which I can say that the trustees of the town have been guilty of any fraud.

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The next question is, Had the Town of Lake authority to make this contract? The Town of Lake was in existence as a corporation at the time the act in relation to corporations in general was passed, and I can have no doubt the one hundred and sixty-eighth section of the ninth article, to be found on page 240 of the revised statutes of 1874, operated on the town. That section is: "Any city or incorporated town or village may, if it shall so determine by ordinance, adopt the provisions of this article without adopting the whole of this act, and, where it shall have so adopted this article, it shall have the right to take all proceedings provided for in this article, and have the benefit of all the provisions hereof."

Now, as to the adoption of this article since by ordinance: It is said that this act provided that the various provisions of this law should be adopted; that the corporation should be created by a vote of the people; and as that provision existed, therefore when this section declared that any city or incorporated town or village might adopt article nine by ordinance, it meant that it was an ordinance to be enacted in pursuance of a vote of the people. I think that can hardly be inferred from this law. If it had been the intention of the legislature that that provision should be adopted only by a vote of the people, it certainly would have so stated.

This was a law that operated upon towns existing at the time it was passed, and, when it declared that the ninth article might be adopted by ordinance, it merely meant that it should be adopted by such declaration of the town authorities as indicated the will of the corporation itself, and a determination to make it a part of the existing provisions of law operating upon the town.

The next question is whether the town had the right to make this contract by existing law independent of the act of the 15th of April, 1873. The law under which it is claimed that this contract was made declared that the corporate authorities of cities and villages were clothed with the power to make local improvements by special assessment or by gen-

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eral taxation, or otherwise, as they should by ordinance prescribe.

Now, there might have been possibly some question in relation to the authority conferred by this statute as to the construction of these water-works, had it not been for the law of 1874. The act of the 15th of April, 1873,¹ was a special act authorizing cities and incorporated towns and villages in the state to provide for a supply of water for the purposes of fire protection, and for the uses of the inhabitants.

That law contained various provisions connected with the supply of water; and the question is whether that law repealed by its terms the previous law which was in force. Its language is undoubtedly general: "All cities, incorporated towns, and villages in this state * * * are hereby authorized and shall have power to provide for a supply of water," and then follows this proviso: "That all contracts for the erection or construction of such works or any part thereof shall be let to the lowest responsible bidder therefor upon not less than three weeks public notice of the terms and conditions upon which the contract is to be let, having been given by publication," etc. Now, there is no repealing clause in this law, of prior laws; and the rule universally applicable to such cases is that if the prior law can stand consistently with the provisions of the subsequent law, it shall remain as a valid law. They shall be so construed by the court.

Now, I agree that if the provisions of the subsequent law are necessarily repugnant to the prior law, and the two are so inconsistent that they cannot be reconciled, the subsequent law must be construed as repealing the prior law; but it is only when those conditions exist. Here I think there are various conditions contained in the prior law, and they are of such a character as to indicate that the two laws may stand together.

Then, that being so, what is the effect of the act of the

¹ Laws of 1873, p. 190; Revised Statutes, 1874, p. 260.

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17th of March, 1874,¹ upon the law in force prior to April, 1873. It is substantially a legislative construction of the prior law so far as this is concerned; it concedes the existence of the right in towns and villages to supply themselves with water, under the ninth article of the law which has been referred to. It is true that it is said to be prospective in its operation, "that whenever the corporate authorities of any city, town, or village shall provide by ordinance for the laying of water supply pipes, to be paid for by a special assessment to be made under the provisions of article nine of the act of the General Assembly, entitled, etc.," therefore making a special reference to article nine.

Now, suppose it is prospective in one sense. The contract was made with reference to a law subsequently to be passed, so understood by the parties, and, when the law is passed as we find it, it must be supposed to include within its operation the contract that was made in this case, under the general law, when, by the terms of the contract itself, it was clearly within the contemplation of the parties that, until this law of 1874 was passed, no bonds could be issued to comply with this contract. It would be sticking in the bark to say that these laws did not operate upon this contract, and upon the property and property-owners in this town, so as to authorize the issue of the bonds to pay for a contract which had been previously made under the authority of the ninth article. It is conceded that, without the law of April 15th, 1873, the town authorities, by a vote of two-thirds, could dispense with the notice which is required absolutely by the act of April 15th, 1873.

These are the views I now entertain of this case. I think this contract was a valid contract. I think there was no fraud in it to vitiate it, but I wish to preserve some power over the case and over facts which may subsequently be developed. I

¹ Revised Statutes, 1874, p. 251.

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will therefore not dismiss the original bill, but I will refer the case to the master under the cross-bill, with specific directions to report. The counsel may draw up an order to that effect requiring the master to report, among other things, the amount of profits these parties have made under this contract.

STEPHEN OSGOOD vs. CHICAGO, DANVILLE &
VINCENNES RAILROAD COMPANY *et al.*

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—APRIL,
1875.

IN EQUITY.

1. Act of Congress of March 3, 1875,¹ construed.
2. This act consolidates and repeals all previous general acts of Congress on the subject.
3. REMOVAL FROM STATE COURT.—Since its passage a defendant, though a citizen of the state where the suit is brought, may remove the case from the state to the Federal Court.
4. CO-DEFENDANTS.—Petitioners may have a removal though their co-defendants do not join in the petition, if the controversy is wholly between them and the plaintiff, and can be fully determined as between them; and such a case arises where a bill is filed by a bondholder of a railroad company, and the company, its officers and the trustees under its mortgages petition for removal.
5. JUDGMENT CREDITORS.—CROSS BILL.—The existence of judgment creditors and the fact that one of them has filed a cross-bill, does not affect the right of removal.
6. SEIZURE OF RES BY A STATE COURT does not affect the case, for that is necessarily transferred with the case.

¹ 10 U. S. Statutes at Large, 470.

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7. **COLLATERAL ISSUES** connected with the *res* in the state court do not destroy the right of removal, provided the parties are within the statute.

8. **VACATION.**—The petition and bond may be filed in the state court during vacation, and may be sufficient, though there was no action upon the petition or bond.

9. **IRREGULARITIES IN THE REMOVAL** do not vitiate it, nor authorize the Federal Court to remand or dismiss it; if it has jurisdiction, it should retain it.

10. **RECORD—CERTIFICATE.**—It is not essential that the record be certified by the judge of the state court; the attestation of the clerk under the seal of the court is sufficient.

11. **VERIFICATION.**—It is not necessary that the petition for removal be verified by affidavit.

12. When the petition and bond are filed in the state court during vacation the jurisdiction of that court ceases; it does not remain until the court can act upon them in term time; and it is not for the state court to decide whether a proper case is made.

On the 22d of February, 1875, the plaintiff, a citizen of Massachusetts, as a bondholder of the railroad company, filed a bill in the Will County Circuit Court, to foreclose a mortgage, making as defendants, the company, its president, treasurer, and directors, and also the trustees of mortgages amounting to several millions of dollars, given by the railroad company. The bill charges various breaches of trust on the part of the officers of the company, and asks for an injunction to prevent them from negotiating certain bonds of the company, and for a receiver. The court, without notice to the defendants, issued the injunction and appointed receivers at the time the bill was filed. On the 23d of February, a petition was filed in the state court by some of the non-resident defendants to remove the suit into this court, which was refused by that court. On the 24th of February, the bill was amended by making various judgment creditors defendants. On the same day, one of the judgment creditors answered and filed a cross-bill praying the court to enforce the lien against the company, and that the receiver should pay the same. On the 26th of February, on petition, other creditors of the company were made defendants, who asked leave to file cross-bills. These

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claims of the judgment and other creditors were all subsequent in point of time and right to those of the bondholders under the mortgages. On the first of March certain persons petitioned to be made co-plaintiffs.

There was no action of the court on the petition last referred to, and the only cross-bill filed was that of the 24th of February, already mentioned. A demurrer had been filed to the bill, argued and taken under advisement by the court. There had also been some incidental motions made in the case, which need not be particularly referred to. The court had adjourned for the term. This was accordingly the position of the case when, on the 22d day of March, petitions were filed in that suit with the clerk of the court by the railroad company, a corporation of this state, Judson, the president, and Tenney, the treasurer, and by the trustees, Roberts, Fosdick and Fisk, asking for the removal of the cause from the state court to this court, under the act of Congress of the 3d of March, 1875. The petition alleged that the amount in controversy was of the value of more than \$500, that the plaintiff was a citizen of Massachusetts, that the parties who had petitioned to be made co-plaintiffs were citizens of Pennsylvania, and that Judson, Tenney, and Fish were citizens of New York, Fosdick, a citizen of Connecticut, and Roberts, a citizen of Illinois. Bonds were filed, conditioned as required by the act of Congress. A transcript of the record of the suit in the state court was filed in this court March 24. A motion is made by plaintiff to dismiss the suit, on the ground that this court has no jurisdiction of the case.

Henry Crawford and Joseph E. McDonald, for plaintiff.

Edwin Walker and Geo. C. Campbell, for defendants.

DRUMMOND, J.—It seems to have been the intention, in the recent act, to consolidate into one act all the previous general acts of Congress conferring jurisdiction upon the circuit court,

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and at the same time to give the court jurisdiction in some cases where no previous act of Congress had conferred it. The court has now jurisdiction in suits between the citizens of different states, without regard to the fact whether or not one of the parties is a citizen of the state where the suit is brought. The act also authorizes a case to be removed from the state to the federal court under such circumstances. The judiciary act of 1789, as construed by the Supreme Court, required that each of the parties-plaintiff should have the right to sue each of the parties-defendant, in a suit between citizens of different states, and equally so in the case of removal from the state to the federal court under the authority conferred by the 12th section of that act.¹ The act of 1866 declared that when a suit was brought in a state court by a citizen of that state against a citizen of another state, and a citizen or citizens of the same state as the plaintiff, that if the controversy might finally be determined between the plaintiff and the citizen of the other state without the presence of the co-defendants, it might be removed to the federal court.² The recent act of Congress declares that in any suit mentioned in the law when there shall be a controversy which is wholly between citizens of different states, and which can fully be determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove the suit into the federal court. This is the first time that Congress has authorized a defendant, a citizen of the state where the suit is brought, to remove the case from the state to the federal court. As this is a case where there are several defendants some of whom have not joined in the petition for removal, the question is whether there is a controversy wholly between the plaintiff and those who have petitioned for a removal and which can be fully determined as between them. The contro-

¹ 1 U. S. Statutes at Large, 79.

² 14 U. S. Statutes at Large, 306.

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versy in this case, as between these parties, is whether the bonds referred to in the bill are valid debts against the company, and the mortgages can be foreclosed and the claim enforced against the company; and whether the officers of the company have been guilty of any of the breaches of trust alleged against them. The officers named as defendants, and the railroad company, would seem to be parties whose rights, as between them and the plaintiff, can be fully determined as being a controversy wholly between them. The other parties who have joined in the petition for removal are mere trustees. It is a controversy wholly between citizens of different states.

The fact that there are various judgment creditors whose rights are subject to the prior liens of the bondholders, can not affect the power of removal, their rights remaining unchanged. Neither can the fact that a judgment creditor has filed a cross-bill, for then it would always be in the power of a creditor to prevent the operation of the statute.

The difficulty arising from the possession of the property by the state court is more apparent than real. If the *res* has been seized as an incident of the controversy between the citizens of different states, then the removal of the cause into the federal court transfers the *res* with it as a necessary part of the proceedings, and the fact that collateral issues as connected with the *res* have sprung up in the state court, cannot destroy the right of removal, provided the parties seeking it bring themselves within the terms of the statute. The language of the third section is that the petition for the removal must be filed in the state court before or at the term at which the cause can first be tried. It may prove in some cases, particularly those in equity, difficult to determine the term when the cause can first be tried. It is not claimed in this case that the petition was not filed in due time, but it is objected that it was filed in vacation, and not during any term of the court, and that there was no action of the court upon the petition or on the bond. I do not think the objection can be sustained on either ground. The law requires the petition to be filed in

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the suit, and it may be before the term, and, in fact, it is often desirable immediately after a suit is commenced in the state court to remove it into the federal court before there is any action of the state court in the case. It is true that under the statute the bond must be good and sufficient security, but it does not declare that it shall be approved by the judge. It requires the state court to accept the petition and bond and proceed no further in the case. Now suppose the state court should refuse to accept the petition or the bond, or should decide that a bond valid under the law and with good and sufficient security, was not so, would that deprive the party of the right of removal? Clearly not. This statute seems to have been passed with a full knowledge of the difficulties growing out of the action or non-action of the state courts under previous laws, and with a determination to make the power of removal independent of the action of the state court. It is not stated in every case under this statute, as in those of 1789 and of 1866, that certain facts are to appear to the satisfaction of the court. And this is the more apparent from the authority conferred on the circuit court, by the 7th section, to issue writs of *certiorari* to the state courts with power to enforce them, and from what is stated in the same section as to the time of removal if the circuit court of the United States shall hold its next term within twenty days after the petition and bond are filed in the state court. The 5th section was intended to protect a party in case of the improper removal of a suit from the state to the federal court, but the language of that section is peculiarly significant as affecting the motion now before the court. The copy of the record has been filed in this court, and the law seems to indicate under what circumstances only, in such an event, the case should be remanded back to the state court. It is when it shall appear to the satisfaction of the federal court that the suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the court, or that the parties have been improperly or collusively made, or joined, for the

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purpose of creating a case cognizable under the act. It is true that the act prescribes the manner in which the removal shall be made, and the directions of the law should be complied with. But the 5th section does not authorize the court to remand or dismiss the cause for the reason that it may appear that there was any irregularity in the means taken to procure the removal. The purpose obviously was, if the record was filed in the federal court under the law, and the court could see that it had jurisdiction of the case, that it should retain it, notwithstanding there might be defects in the manner of removal.

It is also objected that the record from the state court, while certified by the clerk under the seal of the court, has not also the certificate of the judge. This last has never been considered necessary where the record comes from a court of this state. The attestation of the clerk under the seal of the court is sufficient in any court of this state, and is so in this court. A further objection is that the petition for removal is not verified by affidavit. That is not required by the act of 1789 or the act of 1866, nor is it by the act of 1875, though it was by the act of 1867.¹ So that on the whole I think it is the duty of the court to allow the case to stand as between the plaintiff and the parties-defendant who have petitioned for its removal into this court, and to overrule the motion to dismiss; and it will be so ordered.

BLODGETT, J., concurring.

After the foregoing opinion was prepared, on application of plaintiff's counsel, a re-argument was allowed before Drummond and Blodgett, JJ.

DRUMMOND, J.—It has been insisted on the re-argument that this court cannot take jurisdiction of the case, on two grounds:

1. The case itself is of such a character that it is not removable under the statute.

¹ Cases of the Sewing Machine Companies, 18 Wallace, 553.

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2. The case cannot be removed independent of the action of the state court.

The first clause of the second section of the act of 1875,¹ states when a case can be removed to the federal court. It must be a suit of a civil nature at law or in equity. pending at the date of the act, or brought thereafter in the state court. The matter in dispute must exceed \$500. It must be a suit arising under the Constitution or laws of the United States, * * * or in which there shall be a controversy between citizens of different states. * * * This clause refers to a removal by either party, that is, by the whole of what constitutes the one side or the other.

The second clause of that section states when a case can be removed by either parties less than the whole. There must be in a suit in the state court a controversy wholly between citizens of different states, and such that it can be fully determined as between them; if so, then any one or more of the plaintiffs or defendants actually interested in the controversy may remove "said suit," into the circuit court of the United States.

There was here a civil suit in equity pending in the state court at the date of the act, where the matter in dispute exceeded, exclusive of costs, the sum or value of \$500.

Was there in this suit a controversy wholly between citizens of different states? The plaintiff was a citizen of Massachusetts, the railroad company a citizen of Illinois. The railroad company had executed to trustees certain mortgages on its property to secure an indebtedness due from the company, of which the plaintiff held a part. He was not a trustee of either of the mortgages. The trustees and the company, and some of its officers, made defendants and all of them citizens of different states from that of the plaintiff, petitioned for the removal of the cause.

¹ 18 U. S. Statutes at Large, 470.

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Now, the controversy between these parties was wholly as to the debt and validity of the mortgages and the enforcement of the same.

The trustees represented the other creditors as well as the plaintiff. It was then in effect a controversy wholly between the trustees as the representatives of the creditors, and the railroad company. There can be no doubt that, so far as it relates to citizenship, it was entirely competent for the plaintiff to bring his suit in this court instead of the state court. And having done the latter, that it was equally competent for the defendants, as the case then stood, to remove it to the federal court. Was this right lost by the subsequent facts which appear in the case?

After the bill was filed receivers were appointed, and certain judgment and other creditors were made defendants, one of whom filed a cross-bill.

The mere possession of the property clearly could not affect the result, as appears from the fourth section of the recent act. That was connected wholly with the controversy of the original parties, and did not prevent it from being exclusively between them. It does not appear that any of the creditors were citizens of the same state as the plaintiff, but, conceding that there was a controversy in the suit whether the judgments were valid liens on the property, and whether the debts of the other creditors were binding on the company, and that some of the creditors were citizens of the same state as the company, was the right of removal gone?

It is said that the language of the second section of the act of 1875, is different from the act of 1866, the former declaring that either one or more of the parties "may remove said suit" into the federal court. It is insisted that that means the whole suit, and not the part which involves merely a controversy between citizens of different states, and therefore, if there should be incidentally a controversy in the suit between citizens of the same state the effect would be to remove this last as well as the other, and therefore, the federal court would take

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jurisdiction of a controversy between citizens of the same state, which would be unconstitutional.

If we were to admit the premises we hardly think the conclusion would follow. If the whole suit is removed because of the principal controversy between citizens of different states, and in order to fully determine that as between them, other controversies between citizens of the same state arise in the suit, there is no objection to the federal court taking jurisdiction of the latter. It is matter of common practice to do this in the settlement of legal and equitable rights. Having control and jurisdiction of the principal, the incidents go with it. In every case where this court forecloses a railroad mortgage, this doctrine is enforced; so that the true rule, even on the hypothesis stated, would seem to be to ascertain whether this court had jurisdiction of what may be regarded as the main controversy, and whether the others, between citizens of the same state, are mere incidents of such controversy. In this case the claims of the defendant-creditors, it is presumed, depend on the effect and validity of the mortgages, which, if sustained, give the bondholders the paramount claim. The former may therefore be said to represent mortgage debts. If this is so, there is no good reason why the whole suit may not be removed to this court. Whether the act intends to authorize the removal of the whole suit in every case where there is a controversy between citizens of different states, and which can be fully determined as between them, without regard to other controversies in the same suit and the citizenship of the parties in the suit, and whether, if so, the act is in that respect constitutional, need not be here decided. Neither is it necessary to decide whether the act, in any case where there may be in the suit controversies between citizens of the same state, permits them to remain to be determined by the state court.

Upon the second ground we commence with two admissions made by the plaintiff's counsel. They concede:

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1. Under the 3d section of the act of 1875,¹ the petition for removal and the bond required, can be filed in vacation in the suit pending in the state court.

2. If the statute is complied with, the state court has no discretion, and its refusal to accept the petition and bond, and the omission to note the refusal on the record, would not deprive the party entitled thereto of the right of removal.

These admissions necessarily grow out of the words of the statute. If the facts as named therein exist, then the party entitled to remove the suit may file a petition in such suit in the state court before the term at which the cause could be first tried, and file therewith a bond with good and sufficient security. The bond and petition may therefore both be filed out of term time; they are to be filed in the suit pending in the state court, that is, with the clerk in the ordinary way in which papers are marked and filed in a suit. Now, if the proper petition and bond are filed with the clerk in the suit pending in the state court by the party entitled to do so, in vacation, what is the status of the case from the time of filing the same until the meeting of the state court?

According to the view of plaintiff's counsel, the court having had no opportunity in open court to accept or refuse the bond and petition, there is jurisdiction still in the state court, and the judge of that court can make any order in the case permitted to a judge under such circumstances; that is, he can, if necessary, grant an injunction, and (in this state) appoint a receiver of property. There ought to be authority somewhere to protect the rights of parties in the contingency named. Having filed the petition and bond with the clerk in the given case, the applicant has done all that the statute requires. He need not call upon the court to act at all. No order is to be made in court, at least the statute names none, unless the mandate that the court "shall accept the petition and bond" implies one.

¹ 18 U. S. Statutes at Large, 471.

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The language is somewhat different in the other statutes: "shall accept the surety." When is it that the court shall "proceed no further in such suit"? It is well to notice the different language in another part of the section. When the suit relates to the title of land, and is between citizens of the same state, then the value must be made to appear, and certain statements (and affidavit if required by the court) must be made, all showing that the court is called on to act. But it is said that, in this case, the court must judge whether the bond was good and sufficient security, and must accept that and the petition.

It may be proper to consider the former legislation on this point. The act of 1789 required, in order to effect a removal from the state to the federal court, that the defendant should, at the time of entering his appearance in the state court, file the petition for removal.¹

The act of 1866 declared that the petition might be filed "at any time before the trial or final hearing of the cause;" but nothing is said as to the manner of filing other than by the use of such general words.² The act of 1867 required an affidavit and petition to be filed in the state court at any time before the final hearing or trial of the suit.³

These acts were, it is presumed, all repealed by the Revised Statutes of the United States, which, however, incorporated their substantial provisions in section 639.

The law in force upon the subject of removal, at the date of the act of 1875, was as follows: "In order to such removal, the petitioner in the cases aforesaid must, at the time of filing his petition therefor, offer in said state court good and sufficient security,"⁴ etc.

The act of 1875 for the first time expressly authorized the

¹ 1 U. S. Statutes at Large, 79.

² 14 do., 306.

³ Id., 558.

⁴ U. S. Revised Statutes, 1874, p. 113, sec. 639.

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petition and bond to be filed out of term time. There must have been some object in this change. We think it was to prevent the state court from proceeding further in the case after the proper papers were filed in the suit with the clerk.

There was nothing more to be done in order to perfect the right. A condition of the bond is that the petitioner shall enter in the Circuit Court of the United States at its next term a copy of the record of the suit, and pay the costs if the suit be wrongfully removed, and is for the benefit of the opposite party.

The seventh section of the statute has an important bearing on the question. It often happens that the terms of the state court are only once or twice a year. If after the filing of the petition and bond in the suit in the state court not in term, the Circuit Court of the United States should sit before the state court—for example, the former in one month and the latter in two months from the time of filing the petition and bond—if there must be an opportunity for the state court to act on them before the right of removal is perfected, how is it possible for the petitioner to comply with the condition of the bond?

The only answer that can be given is that, in spite of the words of the third section that the bond and petition may be filed before the term, there is in fact and law no filing of the petition and bond until the court is in session, in effect thereby striking those words out of the statute, and thus the state judge has power over the case from the commencement till the petition and bond are presented to him while holding court, which we think Congress intended he should not have when they were duly filed in vacation.

Under previous laws, in some instances the clerks of the state court would not give copies of the record when a petition for removal was filed. The recent act imposes a severe penalty in case of their refusal to furnish a copy of the record, after tender of the legal fees, to any one applying for removal, not when the removal is ordered or refused by the court. It

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is said there must be a power in the state court to determine whether the petition and bond are sufficient, and whether the case is removable under the statute. It is true that the party seeking the removal of the cause must be entitled to the same, but we think the statute did not intend to permit the state court to judge in such a case as this whether a proper case was made. That was one of the difficulties under former statutes. If the state court chose to proceed, the only remedy was supposed to be through the highest court of the state, to the Supreme Court of the United States.¹ This statute gives the Circuit Court of the United States power to issue the writ of *certiorari* to the state court in any cause removable under the act, and therefore to the federal court the right to determine whether the cause is properly removable.

It is claimed by the plaintiff's counsel that that is given when the state court refuses to act. But the state court may omit to place on the record the refusal or non-action, and whether it does or not, there can be no object in issuing a writ of *certiorari*, the sole effect of which is to bring the record into the federal court, if it is already there duly certified by the clerk under the seal of the state court. This statute has not given power to the Circuit Court of the United States to compel the state court to act by writ of *mandamus* or otherwise. The sole object of the writ of *certiorari*, as the statute itself says, is to make a return of the record.

The fifth section contains provisions which are new. It is true that in practice under previous laws, when a case came into the federal court by removal from the state court, motions could be made to dismiss and remand the case, but their decision depended on general principles. Now the fifth section controls the action of the federal court, both as to the dis-

¹ See *Hough vs. Western Transportation Company*, 1 Bissell, 425; *Akerly vs. Vilas*, 2 do., 110; *In re Cromie*, id., 160, and authorities cited in those cases and notes.

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missal and remanding of cases. It did not intend that the suit should be dismissed or remanded on account of irregularities, provided it satisfactorily appeared that the court had jurisdiction of the cause. Here the only thing to which objection is now made is as to the character of the suit and the want of opportunity of the state court, as a court, to act or refuse to act. There is no complaint made against the sufficiency of the bond.

It is said we treat the state courts with disrespect in not allowing them to pass upon the case under the statute. We would treat them more disrespectfully if we disregarded and overruled their action, as it is admitted we would have the right to do in a proper case.

What might be the effect of the record of the state court being filed in the federal court before the term next after the filing of the bond and petition in the suit in the state court, upon the general status of the case, it is not necessary to consider. There possibly might be a question whether the case would be in every respect before the federal court prior to its next term.

It may be admitted that there are difficulties in any view we may take of this part of the case, but we are at a loss to understand how the fact that the state court has not had the opportunity to pass upon the application, can alone confer the right of removal, when it is admitted that the action or non-action of the state court may be immaterial.

If the petitioner has brought himself and is within the terms of the law, and the right of removal is complete, then when there is added to that a copy of the record duly filed in the federal court (and special bail given when requisite), the act of removal has taken place.

BLODGETT, J., concurring.

The above decision commented on by Judge BAKER, of the Alexander County Circuit Court, who held that the act of Congress contemplated some action by the state court, and that if the state court was satisfied that the party

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was not entitled to removal of the cause, the cause might be placed upon the docket, and proceed to trial. *Mayo vs. Taylor*, 8 Chicago Legal News, 10; see also as to possession of *res*, *Gaylord vs. Ft. W., M. & O. R. R. Co. ante*, p. 286, and *Union Trust Co. vs. R., R. I. & St. L. R. R. Co. ante*, p. 197. —[Reporter.

ELISHA S. BURR vs. OTIS B. HOPKINS, ASSIGNEE OF
R. D. TRAPHAGEN.

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—APRIL,
1875.

IN BANKRUPTCY.

1. SURRENDER OF PROPERTY AND PROOF OF DEBT.—In a case simply of constructive fraud, a mortgagee who has taken the mortgaged property and held it until a trial and finding against him in favor of the assignee, but who then, and before judgment, surrenders the property, may be allowed to prove his debt in bankruptcy.

2. In this case he was ordered to pay a reasonable fee to the counsel for the assignee, and all costs and special expenses.

Mariner, Smith & Ordway, for appellant.

Winfield Smith, for respondent.

DRUMMOND, J.—Before the petition in bankruptcy in this case was filed, the bankrupt had given a mortgage on some personal property to Burr. After the decree in bankruptcy and the appointment of the assignee, the latter made application to Burr, who had taken possession of the property under the mortgage, to release it on the ground that the mortgage was made in violation of the bankrupt law, and claiming that

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the property which it covered should be turned over to the assignee. This was declined by Burr, and thereupon the assignee brought a suit in this court to recover the value of the property. The case was heard in March, 1874, without the intervention of a jury, and the court found that the mortgage was contrary to the provisions of the bankrupt law. Before any judgment was rendered, the defendant in that suit—the present plaintiff—paid the value of the property as found by the court and costs in the case, and the suit was afterwards dismissed without any judgment having been rendered. Under those circumstances the present plaintiff tendered proof of the original claim which the mortgage was given to secure. It consisted of several promissory notes. Upon application to the district court the claim was disallowed, because the mortgage which was given to secure the notes had been executed in violation of the bankrupt law, and therefore the court held that he was deprived of the right to prove the claim against the estate of the bankrupt. From the order of the district court an appeal has been taken, and the question now before the court is, whether or not that order was correct. As the case was tried before me, I am acquainted with the particular circumstances which appear in the case, and gave rise to the questions of law upon which it was decided in the district court.

There was not, in fact, any actual fraud committed by the mortgagee. It was only a case of constructive fraud, and by no means free from difficulty, as was stated by the court at the time. The statute upon the subject declares that the party who has received benefit from the transfer of property or by the execution of an instrument in violation of the provisions of the bankrupt law, shall not be entitled to prove his claim if he is a creditor, unless he surrenders the property.

The language is: "Any person who * * * * * accepted any preference, having reasonable cause to believe that the same was made or given by the debtor, contrary to any provision of the act * * * * * shall not prove the debt or

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claim on account of which the preference is made or given, nor shall he receive any dividend therefrom until he shall first surrender to the assignee all property, money, benefit or advantage received by him under such preference.”¹ It is under this section that Burr seeks to make the proof of claim against the estate of the bankrupt in this case. He says he has surrendered all the property that he obtained by virtue of the mortgage, and the question is, whether the circumstances which have been detailed are such as to bring him within the privilege conferred by this section of the bankrupt law. It is to be observed that no time is fixed by the statute when the surrender is to be made. The construction which has been given to this section is, that the surrender must be made before the assignee shall recover the property which has been wrongfully conveyed by the bankrupt. Now in this case there was a trial before the court, and the issue was found. There was no judgment rendered. Was there within the meaning of the law a technical recovery of the value of the property, so as to preclude the creditor from proving his claim against the estate? My view of the law is, that in the absence of any actual fraud committed by the person seeking to prove his claim, and where it may be fairly said there is a serious doubt upon a question of law—where, in other words, there is nothing but a constructive fraud, and the creditor has acted in good faith and under the conviction that he has a valid right to retain the property—that he may do so, and may even allow a suit to be prosecuted, and proof to be introduced against him, and not be deprived of the benefits conferred by the section referred to. It is often a very nice question, among lawyers and judges, whether in a given case a party is within the condemnation of the statute. There are some cases where it may be said there can be no real controversy, but in others there may be difficult questions to determine;

¹ Original act, section 23, U. S. Revised Statutes, 1874, § 5084.

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and to say, that if a party in good faith, believing that he has a valid claim on property, resists the right set up by the assignee, even after the commencement and prosecution of a suit, he is thereby deprived of the right of proving his claim, if the court shall find that he has committed a technical offense against the law, seems to me to be a rather hard rule. Where there is actual fraud there should be no hesitation under the provisions of the law, as they existed at the time this case was tried. But I am not prepared to say, because the party or his counsel has made a mistake as to his rights, and it is simply a question of constructive and not actual fraud, that he is to be deprived of the right to prove his claim. As soon as the opinion of the court was ascertained, he at once submitted and then surrendered all the property or its value.

If he had allowed the case to go to judgment, possibly it might have been different. There have been numerous cases decided under this section of the statute. They are nearly all to be found as a note to section 5034, on page 557 of the seventh edition of Bump's Bankruptcy, and it is sufficient to say that there is nothing in these decisions, taking them altogether, to prevent me from deciding this case according to what I conceive to be the true equitable rule. I have seen no case which compels me to hold that this mortgagee is precluded from filing his claim against the estate. Again, I cannot disregard the view which Congress has since taken of the subject.

In the amendment which is made to the bankrupt law by the act of June 22, 1874, Congress has gone, perhaps some persons might think, too far. And although this amendment was not in force at the time that this mortgage was made, or even at the time that the case was tried before the district court, still we may look into it for the purpose of seeing what Congress was inclined to do at the time this amendment was passed. It amended the 39th section of the law, in several important particulars, and among other amendments was this: "If such person shall be adjudged a bankrupt, the assignee may recover back the money or property so paid,

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conveyed, sold, assigned, or transferred contrary to this act; *provided*, that the person receiving such payment or conveyance had reasonable cause to believe that the debtor was insolvent, and knew that a fraud on this act was intended; and such person, if a creditor, shall not, in case of actual fraud on his part, be allowed to prove for more than a moiety of his debt."¹ That may be thought to be going very far, in actual fraud—allowing a person to prove for one-half of his debt. However, while reversing the order of the district court, I desire to provide for the protection of the estate. The estate should not be prejudiced by a prosecution which could not be successfully maintained, as the result proved. The money was all paid, the costs were also paid, and the only thing that remains is any other expense to which the estate has been subjected by the prosecution of the suit in the circuit court, so I shall remit the case to the district court, with instructions to allow the mortgagee, Mr. Burr, to prove his claim, upon the payment to the assignee of a reasonable compensation for the counsel who prosecuted the case, and also for any special expenses that the assignee may have been subjected to in consequence of that prosecution.

I am of opinion that it makes no difference whether the mortgage was adjudged constructively fraudulent under what is termed the statute of Elizabeth, as re-enacted in this state, or under the special provisions of the bankrupt law.

¹ U. S. Revised Statutes, 1874, § 5021.

UNITED STATES vs. PARKER R. MASON *et al.*DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—MAY,
1875.

1. **GOVERNMENT CONTROL OVER DISTILLERIES.**—The Government has, under the revenue laws, the right to control and regulate the manufacture of spirits, for the purpose of the collection of its revenue.

2. **RIGHT TO EXAMINE BOOKS.**—The Government has the right to examine all books kept by a distiller or rectifier pertaining to his business—his private books as well as those required by law. Such examination should be made by order of the court, and in the presence of the party or his counsel.

3. **PRIVATE BOOKS.**—If the private books show a different state of facts from that shown by the books kept for the Government, they may be treated as Government books also.

4. **OPENING VAULTS.**—If the distiller refuses to produce his books, the court may order the vaults containing them to be opened by its officers.

5. It is not necessary to specify the books, but the officers may take all books found on the premises, the presumption being that they belong to the distilling business.

Motion to compel the defendants, distillers, to produce their books and papers for the inspection of the government officials.

J. D. Ward, U. S. Attorney, and *John E. Burke*, Assistant U. S. Attorney, for U. S.

Matt. H. Carpenter and *Edmund Jussen*, for defendant.

BLODGETT, J.—The questions before me are presented in two lights, or rather there are two proceedings before the court for decision, involving substantially the same points. Within a short time after the seizure of the rectifying estab-

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lishment of Parker R. Mason & Co., and the distillery and rectifying establishment of Roelle, Junker & Co., an application was made to the court on behalf of the claimants of the property, setting up, in substance, that the officers of the government had possession of the establishments of the claimants, and that in the establishments, respectively, were safes or vaults which contained the private books, writings, and papers of the claimants, and that the officers threatened to open the vaults or safes, and examine and carry away the books, etc. Upon the showing made by the petition an injunction order was entered by the court, restraining the officers of the government from opening the safes or vaults until the question could be argued and determined by the court as to the right to seize and examine books and papers.

Shortly after the granting of this injunction, and before the time fixed for the argument, the district attorney came into court, and, under the provisions of the fifth section of the act of 1874, entitled, "An act to amend the customs-revenue laws and repeal moiety laws,"¹ asked for an order authorizing an examination of certain books belonging to the parties in question, stating in substance that those books would tend to prove the issue raised by the seizure proceedings.

The questions argued were practically whether the injunctive order which was granted in the first instance in favor of Parker R. Mason & Co., and Roelle, Junker & Co., should be made final, and also whether the respondents, the claimants of the property which had been seized, should be required to produce their books for the inspection of the officers of the government.

The property which has been seized in this instance is all the property used in the business of distilling and rectifying, which the claimants were carrying on. The property seized consists of the distillery, tools, apparatus, material, and dis-

¹ 18 U. S. Statutes at Large, 186.

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tilled spirits on hand, found upon the distillery premises, and the liquors found in the rectifying establishments, with the apparatus and fixtures used in the rectifying business. The government claims to have seized this property under the various provisions of the internal revenue law, subjecting the property of distillers and rectifiers to seizure in cases of violation of the provisions of the revenue law.

An examination of the various provisions of the revenue law, which I will not go through in detail, shows that this law is framed substantially upon the theory that the government is, for the purpose of collecting the tax imposed, to exercise an exclusive surveillance over the manufacture and the rectifying or compounding of alcoholic spirits.

The first question presented is: Has the government the right to take charge of the private business of individuals of any character for the purpose of revenue, and exercise the control over that business, determine the manner in which the manufacturer shall manufacture, the time wherein he shall work, the manner in which he shall store or keep the article manufactured, and, in fact, oversee and regulate his entire business?

Revenue laws of this character are not new to this government. They were adopted at an early day, and have been rigidly enforced, and no question has been seriously raised as to the right of the government under the powers granted in the Constitution, to exercise this kind of surveillance and control over certain classes of business. The same power had been assumed and exercised by other governments, from whom, to some extent, this government copied or derived its forms for raising revenue, and we find that the English government had assumed, long prior to the Revolution and to the Declaration of Independence by the American colonies, the control of the manufacture of spirits within its realm, as well as the manufacture and sale of various other commodities; and notwithstanding the high tax which was imposed in the early days of the late war upon distilled spirits, and the difficulty

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which the government had in enforcing the collection of that tax, the power of the government to exercise this surveillance over this class of business was never seriously questioned, or if questioned, it was never sustained in any court of competent jurisdiction, so far as I have been able to ascertain. I therefore assume that it is now an established proposition, that the government has the right to take the control of the manufacture of the alcoholic spirits for the purpose of managing the collection of its revenue assessed upon those spirits; that it has a right to exercise the surveillance which it assumes under the various laws now in force over the manufacture and sale, and compounding and rectifying of alcoholic spirits.

Assuming, then, that the government has the right to exercise this control, I find on examination that, under the laws now in force, the government practically runs the distilleries, that is, it superintends every department, from the fitting up of the distillery up to the sale and delivery of the spirits by the manufacturer. It requires its officers, in the first place, to take a survey of the distillery, to determine its capacity, to determine how long the mash shall set before it is distilled, and to determine the time of distillation. It takes the measure of the capacity of every vessel for holding the distilled spirits, and the material from which the distilled spirits are manufactured. It requires its officers to keep an account of all the material purchased,—of the grain, malt, yeast, fuel, and all material that goes into the manufacturing process.

In addition to all this, it requires the distiller to keep certain books in which he shall truthfully set down every article purchased, as it is purchased, which goes into his distillery, or is used therein for the purposes of the manufacture of alcoholic spirits. It requires the measurement of all the spirits run or manufactured, their gauging and proof to be ascertained, and a record to be kept thereof, by which such spirits can be identified in the market. They cannot be delivered from the distillery except under the inspection of the

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sworn officer of the government; and not only that, but the distiller must keep a record of all spirits which are delivered from his distillery. And an inspection or examination of the law shows or indicates very clearly that it is the intention of the law to provide for the keeping of these books in such manner as that they shall truthfully show all the material facts in regard to the spirits produced and removed from each licensed distillery.

It is claimed in these cases that the distillers and rectifiers have kept the books required by law,—that is, it is so claimed on the part of the distillers; and the only question in this case is: Shall the government have access to any other books which the distiller or rectifier has kept in the process of carrying on his business? And it seems to me very clear that when you accept the proposition that the government assumes this absolute control of the business of the distiller, and this surveillance over the manner in which the business is carried on, it follows almost as a necessary conclusion from the first proposition that the government has the right to examine any books which the distiller or rectifier may keep pertaining to his business as a distiller, or a rectifier, or a compounder, which will tend to establish either the verity or the want of verity of these books; that for the purposes of the government every book which a distiller keeps is to a certain extent a government book; that he cannot claim that any book in which he makes an entry pertaining to his distilling business is his private book. It belongs to the government.

True, if he made truthful entries in his government books they would tell the same story, and only the same story, which would be told in his private books, and the two would correspond—and the question is: Should any honest distiller be afraid of a comparison between the books which he has kept for his private information and the books which the law requires him to keep? The truth will not hurt him, and if he has been guilty of any malpractice, then the government, it seems to me, has the right to examine any of the books which

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he has kept in the progress of his business, for the purpose of determining the correctness of the books which the law requires him to keep. The law requires that he shall keep these books correctly. The question to be determined is: Has he kept them correctly? And for the purpose of determining that it seems to me that any book pertaining to his distilling business may be examined rightfully by the officers of the government. And this does not seem to me to infringe upon any of the rights which are guaranteed to the citizen by any of the provisions of the Constitution, especially by the fourth and fifth amendments, which were invoked by counsel on the argument, which protect the citizen against unreasonable seizures and searches; also the amendment which protects the citizen against being compelled to give evidence against himself. Nor is the examination of these books, under the circumstances, it seems to me, an unreasonable claim on the part of the government. The distiller, by entering upon the business under the terms of the law, has in effect conceded to the government the right to the fullest and most thorough examination of all his affairs as a distiller. In this business he has no secrets from the government. Such examination is to be made under the order of the court, and in presence of the party or his counsel.

So, too, it seems to me there is no violation of the principle that no man shall be compelled to bear witness against himself. The law, as it has been administered in this country, from the organization of our government, has allowed the books of even a criminal to be used, and entries made by him upon his books were admissible in evidence against him for the purpose of convicting him of a criminal offense. But this is not a criminal offense. This is a proceeding against certain property *in rem*, which is inculpatory for a violation of the revenue laws; and it would seem to me that the question whether a party should be compelled to bear witness against himself or not in a criminal case, is not raised by this proceeding. If these parties were indicted under the crimi-

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nal clauses of the law, the objection might be well taken, but I do not think that question is raised here. Therefore it seems very clear to me that these books which pertain to the management of this property and the management of his business, whether the distiller calls them his private books or not, are the proper subjects of examination under the orders of the court, for the purpose of determining whether he has truthfully kept the books which the law requires him to keep, and has conducted his business as a distiller according to law.

The act of June 22, 1874, "Amending the customs-revenue laws and repealing moiety laws," as it is called, provides in the fifth section, "That in all suits and proceedings, other than criminal, arising under any of the revenue laws of the United States, the attorney representing the government, whenever, in his belief, any business book, invoice or paper, belonging to or under the control of the defendant or claimant, will tend to prove any allegation made by the United States, may make a written motion particularly describing such book, invoice, or paper, and setting forth the allegation which he expects to prove; and thereupon the court in which suit or proceeding is pending, may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice, or paper in court, at a day and hour to be specified in said notice, which, together with a copy of said motion, shall be served formally on the defendant or claimant by the United States marshal, by delivering to him a certified copy thereof, or otherwise serving the same as original notices of suit in the same court are served; and if the defendant or claimant shall fail or refuse to produce such book, invoice, or paper, in obedience to such notice, the allegations stated in said motion shall be taken as confessed, unless his failure or refusal to produce the same shall be explained to the satisfaction of the court. And if produced, the said attorney shall be permitted under the direction of the court, to make examination (at which examination the defendant or claimant, or his agent,

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may be present) of such entries in said book, invoice, or paper, as relate to or tend to prove the allegation aforesaid, and may offer the same in evidence on behalf of the United States. But the owner of said books and papers, his agent or attorney, shall have, subject to the order of the court, the custody of them, except pending their examination in court as aforesaid.”¹

Now it is claimed that the provisions of this law give the distillers the control of their books; that is, that the government has no right to seize the books, but may simply require the distiller or rectifier to produce his books or take the consequences which the law imposes upon him; that is, the confession of the allegations which the district attorney says the books will tend to prove.

I do not construe this law as necessarily implying that the government may not examine these books for the purpose of determining whether there is anything in them which will tend to prove or disprove the charges made against these distillers. And I come to the conclusion that for the purpose of this case I shall require the books of these parties to be produced before one of the commissioners of this court at once, where the government officers may have an opportunity of examining them. After that, it will be for the court to say whether they will be treated as inculpatory property or not. If these books, when examined, shall turn out to be another set, or may be properly understood to be another set of government books or another set of books pertaining to this business of distilling, showing a different statement of facts from what is shown in the government books, I should think it would be the duty of the court to treat them as belonging to the government,—that is, they should be considered as the true distillery books.

The order of the court will be that the books in question, or rather the safes and vaults in question, shall be opened in

¹ U. S. Statutes at Large, 186.

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the presence of the marshal and collectors of internal revenue; that the books and papers therein be taken before Mr. Hoyne, the commissioner, and there subjected to the examination of the district attorney and such officers of the government as he may desire to have examine them, the owners of the property, of course, having the right to be present, represented by counsel, during such examination.

Judge DYER, in the Eastern District of Wisconsin, in *United States vs. Three Tons of Coal, etc.*, approved the above decision, and made substantially the same rulings, see p. 879 this Vol.—[Reporter.

UNITED STATES vs. REUBEN E. DEBARE.

DISTRICT COURT.—EASTERN DISTRICT OF WISCONSIN.—JUNE, 1875.

1. INDICTMENT—VARIANCE.—Where an indictment for receiving stolen goods charges that the accused received the goods from the principal felon, and the proofs show that they were received from a person to whom the thief had delivered them, the variance is fatal.

2. WHEN THE CHARACTER OF STOLEN PROPERTY CEASED.—In a prosecution for receiving stolen postage stamps, the proof was that the thief deposited them in an express office directed to the defendant, and after arrest gave a written order for the property to a postmaster, who took them, and subsequently, by order of the postoffice department, re-deposited them in the express office and they were forwarded to the defendant, who received them. *Held*, that the character of the stamps as stolen property ceased in the hands of the postmaster, and that there could be no conviction.

The indictment charged that on the 19th of November, 1874, the defendant, with intent to defraud the United States, wil-

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fully and feloniously received from one Crawford a quantity of postage stamps, the said stamps having been stolen from a post-office of the United States, and the defendant, at the time he received the same, knowing them to have been stolen.

At the trial the testimony disclosed the following facts.

In the night of November 12th, 1874, the post-office at Unionville, Missouri, was robbed by Crawford, and postage stamps to the amount of about \$156 were stolen. The robber was detected and arrested at Quincy, Ill. Previous to his arrest, he had deposited the stamps in the form of an enclosed package in the express office at Quincy, directed to the defendant at Milwaukee, Wis. After his arrest, he surrendered other property stolen from the Unionville post-office, and on request of the Quincy postmaster, gave the latter a written order on the agent of the express company, for the package of stamps. Upon presentation of this order at the express office the stamps were delivered to the Quincy postmaster, who testified that he took the package to his office, opened it, counted the stamps and placed them in the postoffice vault. He thus retained possession of the stamps until subsequently ordered by the post-office department to let them go forward to the consignee. Using the external wrapper and fastenings, he found upon the package when it came to his possession he re-inclosed the stamps and re-deposited them in the express office to be forwarded, the package bearing the identical directions placed upon it by the original consignor.

Testimony was given on the trial to show that the stamps after being thus forwarded, came to the hands of the defendant. The jury were instructed, that in order to convict, it must be proven as charged in the indictment, that the defendant received the stamps from Crawford, and that if the jury should find from the evidence that the Quincy postmaster, as his individual act, or for and in behalf of the post-office department, forwarded the stamps to the defendant, and that the defendant received them from the postmaster and not from Crawford, there must be a verdict of acquittal, even though

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the stamps were originally stolen by Crawford. The verdict was against the accused. His counsel moved for a new trial on two grounds:

1st. That the verdict was against the evidence and the instructions of the court, and moreover, upon the facts proved, that the jury should have been directed to render a verdict of acquittal.

2d. That when the stamps came into the hands of the Quincy postmaster, their character was that of stolen property recovered by the owner; that they thereafter ceased to have that character, and that when received by the defendant, they were not, as to the person from whom they came, stolen stamps, and therefore there could be no conviction in this case.

Levi Hubbell, U. S. District Attorney, for the United States.

N. S. Murphey, for defendant.

DYER, J.—Careful consideration of the question has confirmed me in the opinion that the instruction given to the jury was right. Undoubtedly it is not, in all cases, essential that an indictment against a receiver should allege by whom the property was stolen. A party may be indicted for receiving goods stolen by persons unknown. In a case where an indictment was objected to because it did not ascertain the principal thief, and did not, therefore, state to whom in particular the prisoner was accessory, it was held good; but “where the principal, however, is known, it seems proper to state it according to the truth.”¹ It is laid down in the books as a settled principle, that if an indictment allege that the goods were received from the thief, it must be proved that they were received from the thief, and if

¹ 2 East's Crown Law, 781.

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it appear that the thief gave them to a person from whom the accused received them, it is a fatal variance. In support of this principle, Arundel's case, 1 Lewis, 115, cited by defendant's counsel, on this motion, is the leading authority. The prisoner was indicted for receiving stolen goods, and the indictment alleged that he received them from the person who stole them, and that this person was a certain ill-disposed person to the jurors unknown. It was proved that the person who stole the property handed it to J. S., and that J. S. delivered it to the prisoner; and Parke, J., held, that on this indictment it was necessary to prove that the prisoner received the property from the person who actually stole it, and he would not allow it to go to the jury to say whether or not the person from whom he was proved to have received it was an innocent agent of the thief.

Now, in the case at bar, the indictment charges that the defendant received the postage stamps from Crawford. To convict, the proof should conform to the charge. If the proof is that the defendant received the stamps from the Quincy postmaster and not from Crawford, the variance is fatal. Crawford was the principal felon. After arrest, as we have seen, the stamps passed into the possession of the Quincy postmaster, who took them from the express office, and subsequently, by direction of the department, forwarded them to the consignee. There was no relation of principal and agent between Crawford and the postmaster. The former had originally authorized the express company to carry and deliver the stamps to the defendant. By his order in writing, given to the postmaster, he withdrew that authority, ceased to be a party to the contract of transportation, and surrendered the stamps to the postmaster. The subsequent re-deposit of the stamps in the express office, was the act of the postmaster under direction of the department, and I think the case is directly within the principle of Arundel's case before cited.

I am convinced, therefore, that it would not have been

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THE WAR EAGLE.

CIRCUIT COURT.—WESTERN DISTRICT OF WISCONSIN.—JUNE,
1875.

IN ADMIRALTY.

1. LIMITED LIABILITY OF SHIP OWNERS.—A steamer used in the upper Mississippi river, is not within the act of Congress of March 3, 1851, limiting the liability of ship-owners.

2. The district court will not, therefore, restrain claimants from suing the owner at common law to recover the full value of freight lost by fire.

This was a petition originally presented to the district court by the Northwestern Union Packet Company, owner of the steamer War Eagle, praying for limitation under the act of Congress of March 3, 1851, of their liability for loss by reason of the destruction of said steamer and its cargo by fire. The War Eagle was a steamer of more than twenty tons burden, duly enrolled and licensed for the coasting trade, and plying between the ports of Dubuque, Iowa, and St. Paul, Minnesota, touching at intermediate points. While making one of her regular trips, on the 24th day of May, 1870, she was burned with her cargo, her boilers and iron, afterwards raised, being the only salvage. The different owners of the cargo commenced suits at common law against the petitioner to recover the value of their goods, and this petition prayed that the interest of petitioner in the wreck and articles saved might be appraised, and upon payment into court of the amount of such appraisement, the various claimants might be cited to prove their respective claims against this fund, and the petitioner be relieved under said act from any further liability, and that the prosecution of suits against petitioner for claims arising for such loss be perpetually restrained.

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The district court held that it had no jurisdiction of the case, and dismissed the petition, whereupon petitioner prayed an appeal to the circuit court.

Wm. Hull, for petitioner.

I. C. Sloan, for respondent.

DRUMMOND, J.—The only question in this case is whether the War Eagle was within the terms of the act. The district court held that it was not. The War Eagle was a steamer of more than twenty tons burden, duly registered and enrolled under the acts of Congress, and engaged in trade and commerce between the several states, but solely on the river Mississippi and its tributaries, when in May, 1870, at LaCrosse, it was destroyed by fire, with a large quantity of goods on board. The petitioner claims that the War Eagle was not within the last clause of the act, viz: "This act shall not apply to the owner or owners of any canal boat, barge or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation."

If the War Eagle was a vessel used in rivers or inland navigation as therein meant, then it was not within the terms of the statute, but was subject to its common law liability.

This clause in the statute was the subject of much consideration in the case of *Moore et al. vs. American Transportation Co.*, 24 Howard's Reports, 1. The question there was whether the navigation of our great northern lakes was inland within the meaning of the law, and the Supreme Court held that it was not.

In that case the counsel of the defendant contended that the act applied wherever admiralty jurisdiction extends, and the counsel of the plaintiff insisted that navigation of the Mississippi river and its tributaries was expressly within the

¹ 9 U. S. Statutes at Large, p. 635.

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words of the clause. The court in its opinion refers to the craft named in the clause, as canal boat, barge or lighter, and says that the character of the craft named will serve to some extent to indicate the class of vessels designated by the place where employed. But in another part of the opinion the court speaks of vessels, whatever may be their class or description, solely employed in rivers or inland navigation, the last two words meaning internal waters connected with rivers, such as bays, inlets, straits, etc. Did the court mean by internal waters those exclusively within the limits of some state, or such internal waters as the Mississippi and its tributaries, running through or along several? We hardly think the former was meant, because it was believed Congress could not legislate as to these, and so the exception was unnecessary. The clause in question was added to the bill in its passage through the senate, and reference was undoubtedly had to an act of George III., which provided that that act should not extend to the owners of any lighter, barge, boat, or vessel of any burden or description whatsoever, used wholly in rivers or inland navigation, or vessel not duly registered according to law.

Now if Congress intended to exclude from the operation of the act all registered or enrolled vessels, it is certainly singular that the language to that effect in the English statute was omitted from ours. Then it must be borne in mind that the act of 1851 was passed before the decision of the Supreme Court in the case of the *Genesee Chief vs. Fitzhugh et al.*,¹ and when among lawyers and judges it was not known that the case of *The Thomas Jefferson*² would be reversed, and when the act of 1845, as to admiralty on the lakes, was supposed to depend upon the authority of Congress to regulate commerce between the states.

On the whole, notwithstanding the case of *Moon vs. The*

¹ 12 Howard, 443.

² 10 Wheaton, 428.

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American Transportation Co., I cannot doubt that it was the intention of Congress to except out of the operation of the act of 1851, a steamer such as the *War Eagle*.

Decree affirmed.

THE KATE HINCHMAN.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY,
1875.

IN ADMIRALTY.

DISTRIBUTION OF PROCEEDS.—Where a vessel has been sold under a libel for wages and the proceeds paid into the registry, they should be distributed as follows:

1. The libel for wages and costs thereof.
2. A regular and duly recorded mortgage.
3. The clerk's, marshal's, and proctor's fees in the various petitions filed, limiting proctors' fees where they have filed more petitions than necessary.
4. The balance *pro rata* among material and supply men, they being at the home port. These have not, since the *Lottawanna* case, a prior lien, even though so stated in the state statutes.

Rae & Mitchell, for material-men.

John C. Richberg for mortgagee.

BLODGETT, J.—The schooner *Kate Hinchman* was libeled in this court for wages, and sold under a decree taken in the case, the proceeds being paid into the registry. After the

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filing of the first libel, several persons who held or claimed liens of various classes against the schooner, came in and filed claims against the proceeds in court. Some time since an order was made that the clerk of the court estimate and report the amount of money in court, the amount of the various decrees, and what they were respectively rendered for, in order that a distribution of the proceeds might be made among the parties entitled thereto.

The clerk has made his report, and from it it appears that a portion of the demands are bills for towing, others are bills for supplies and provisions furnished to the schooner while engaged in trade. Others are for repairs and materials, others for materials and supplies, and one, that of Martin Bedsell, is a claim based upon a mortgage for \$1,648.75 with interest thereon for four years and upwards. This mortgage has been duly recorded, and is in all respects regular upon its face as a lien on the vessel.

The question arising upon the case is as to the manner in which these various claimants shall participate in the fund now in court. It is claimed on the part of the parties who have furnished material and supplies, and shown by the record, that they were furnished under the statutes of the state giving them a lien on the vessel for supplies. It is claimed on the part of the mortgagee that he is entitled to payment in full before the other parties are paid.

After examination of the whole facts in the case, I have come to the conclusion that this fund in court should be distributed in the following manner: The first libel which was filed, and upon which the vessel was sold, was for wages. By stipulation between all parties interested the wages have been paid, but the costs have not been paid. I think the first application of this fund should be to the payment of the costs of the libel for wages. Secondly, I think the mortgagee must be paid in full, and, thirdly, the clerk's, marshal's and proctor's fees in the various petitions which have been filed, should be paid out of the remaining proceeds, limiting the

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fees of proctors who have brought an unnecessary number of separate petitions. I do not think proctors are justified in filing an unnecessary number of petitions or libels where the same items can be filed jointly or consolidated. The tendency on the part of proctors, if the fees claimed are allowed in full, will be to consume the entire fund in costs, instead of allowing it to go to extinguish the indebtedness. The balance of the proceeds will be decreed to be divided *pro rata* among the remaining claimants. I see no difference in the rank or priority of the other various claimants. Some are for provisions, some for materials, etc., and I see no reason why one should occupy any advantage over the others, and I think that they should share *pro rata*.

This case was argued quite elaborately by counsel, as a test case to determine what course to pursue in the matter of liens for supplies furnished in the home port. I do not see that this court has any discretion in deciding on that question, since the decision of the United States Supreme Court in the *Lottawanna* case.¹ It seems to me that whatever doubt might have been felt in regard to the lien of parties furnishing supplies in the home port is now put at rest, and that hereafter we must administer the admiralty law with the understanding that claims for repairs and supplies furnished in the home port are not a lien on the vessel, as against maritime mortgage liens, notwithstanding a lien is given by the state statutes. The mortgagee's lien in this case is superior to all others after the costs in the wages case as was held by my learned predecessor Judge Drummond in the Grace Greenwood case.²

The decree will be entered accordingly.

¹ 20 Wallace, 201; 21 do., 558.

² 2 Bissell, 181.

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MICHIGAN INSURANCE BANK vs. ANSON EL-
DRED.CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—JULY,
1875.

1. JUDGMENT IN ANOTHER STATE—ESTOPPEL.—In assumpsit upon a promissory note, the bar of a judgment in another state upon the same note is not avoided by the record of an action upon that judgment to which the defendant pleaded *nul tiel record*, and in which action plaintiff took a non-suit. The plea of the judgment is good, there is no estoppel, and the second record is not admissible in evidence.

2. ESTOPPELS.—Doctrine of estoppels considered.

This was an action upon a promissory note for 4,000, dated June 12, 1861, made by F. E. Eldred, payable in sixty days, to order of and indorsed by Eldred & Balcom. At the trial, the plaintiff introduced in evidence the note sued on, and after presenting some other testimony not necessary to mention, rested.

To bar a recovery, the defendant, Anson Eldred, introduced in evidence the record of a judgment recovered May 13, 1862, upon this note by the above-named plaintiff against the defendant, in the circuit court of Wayne county, in the state of Michigan. Other testimony not important to notice was then introduced and the defendant rested.

To avoid the effect of the Michigan judgment, the plaintiff offered in evidence the record of an action commenced March 2, 1863, upon that judgment by this plaintiff, against these defendants, in the circuit court of the United States for the district of Wisconsin, the record of which action showed that the defendant, Anson Eldred, interposed as a defense therein the plea of *nul tiel record*, to which there was a rep-

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lication. It appeared also by that record, that on the 18th of April, 1864, a judgment of non-suit was entered in that action. This record, or, to speak more accurately, the defendant's plea of *nul tiel record*, it was claimed by counsel for plaintiff, must operate to estop the defendant from now pleading in the present cause the Michigan judgment as a bar to a recovery.

The defendant objected to the introduction in evidence of the record thus offered, insisting that it was immaterial and created no estoppel. The court sustained the objection, excluded the record, held the Michigan judgment a bar to a recovery on the note, and directed a verdict for defendant; which ruling, was claimed on this motion for a new trial, to be erroneous.

Finches, Lynde & Miller, for plaintiff.

Cottrill & Cary, for defendant.

DYER, J.—I have re-examined the question involved in this cause and the authorities cited by counsel. Upon the single issue presented by the note and the Michigan judgment, the defendant would of necessity be entitled to a verdict, as that judgment would bar a recovery on the note.¹

Could the plea of *nul tiel record* interposed by the defendant, Anson Eldred, in the suit brought in Wisconsin upon the Michigan judgment, operate as an estoppel so as to preclude him from setting up that judgment in the present action as a bar to the plaintiff's recovery upon the note? An estoppel has been well defined as "an obstruction or bar to one's alleging or denying a fact contrary to his own previous action, allegation or denial, upon the faith of which another has acted."

To give to a judgment the effect of an estoppel, it must

¹ *Eldred vs. Michigan Insurance Bank*, 17 Wallace, 545.

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appear that the matter in question was or might have been directly involved in the former action as a necessary issue, and was passed upon by the court or jury at the former trial.¹ The point or question in controversy must have been determined and adjudicated to make the record of the former proceedings conclusive. Where an action has been dismissed or a judgment given for the defendant upon a preliminary point before reaching the merits, it is no bar to another action.² "It is the judgment upon the findings that makes the estoppel. If the judgment be one of non-suit or in the nature of non-suit, and the action be dismissed, nothing whatever is adjudged in respect to a subsequent suit. It is no bar to anything."³ "The rule that estoppels must be certain to every intent, is peculiarly applicable to estoppels by record and judicial proceedings, and for this reason the record of a judgment must show with some degree of certainty the precise points determined, and not from inference or argument; and where it gives no indications at all of what particular matters were adjudicated, it leaves the question unsettled and is not available either as an estoppel or anything else, but merely evidence of its own existence. * * * *"

When the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive *per se*, it must appear by the record of the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined."⁴ A party cannot plead a former judgment as an estoppel to a present action unless the same point is put in issue on the record and directly found by the court or jury.⁵ "The effect of what occurs in one judicial proceeding

¹ *Kerr vs. Hays*, 35 New York, 331.

² *New England Bank vs. Lewis*, 8 Pickering, 113; *Hughes vs. Blaks*, 1 Masson, 515; *McDonald vs. Rainor et al.*, 8 Johnson, 442.

³ *Sheldon vs. Edwards*, 35 New York, 279.

⁴ Herman on Estoppels, section 86.

⁵ *Eastman vs. Cooper*, 15 Pickering, 276; *Gilbert vs. Thompson*, 9 Cushing, 348.

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upon another, is sometimes due to the principles of estoppel *in pais*, rather than by record. A man who obtains or defeats a judgment by pleading or representing an act of adjudication in one aspect, is estopped from giving it a different and inconsistent character in another suit founded upon the same subject-matter."¹ But it must appear that the judgment was obtained or defeated because of the pleading interposed or representation made.

An estoppel *in pais* happens when a party makes a statement or admission, either expressly or by implication, with the intention of influencing the conduct of another, and that other acts upon the faith of such statement or admission, and will suffer injury if such party is permitted to deny it.² "The doctrine of equitable estoppel is founded upon the principle that a party has by his own voluntary act, placed himself in such a situation in regard to some fact, that he is precluded from denying it."³ And it must appear that the declarations or acts claimed to create the estoppel were relied and acted upon by the person in whose favor the estoppel is invoked.

Applying these principles, what is the state of case here presented? Clearly, not an estoppel by judgment, because it does not appear that the judgment of the circuit court in Wisconsin was upon the plea of *nul tiel record*, or resulted from that plea. The form of that judgment is as follows: "This day this cause was called for trial, and came the parties by their counsel, when the plaintiff by its counsel took a non-suit." Then follows a judgment for costs. Nothing was found or determined by the court, as far as the record shows, upon the plea. It was merely a judgment of voluntary non-suit. It is true that the plea of *nul tiel record* was the only plea that could have been interposed in that ac-

¹ Herman on Estoppels, Sec. 100.

² *Norton vs. Kearney et al.*, 10 Wisconsin, 443; *Brown vs. Bowen*, 30 New York, 519.

Herman on Estoppels, Sec. 328.

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tion, except the plea of payment, or satisfaction, or the like. But it does not appear from the record that the act or pleading of the defendant produced the action of the plaintiff in taking a non-suit. It does not appear that the judgment of non-suit was necessitated, or that a judgment for the plaintiff was defeated by the plea of *nul tiel record*. There may have been numerous reasons why the non-suit was taken other than the interposition of this plea. The case of *The Washington, Alexandria & Georgetown Steam Packet Company vs. Sickles et al.*, 24 Howard, 333, is here in point. It was there held that the record of a former suit between the parties, in which the declaration consisted of a special count, and the common money counts, and where there was a general verdict on the entire declaration, cannot be given in evidence as an estoppel in a second suit founded on the special count; for the verdict may have been rendered on the common counts. Since it does not appear that the plaintiff relied and acted upon the plea which the defendant interposed, I think the case is not within the principles of an estoppel *in pais*. Moreover, whether or not there was a valid record and judgment, must have been as well known to the plaintiff in the suit on the Michigan judgment in the Circuit Court in Wisconsin, as to the defendant in that action.

In the cases cited by the learned counsel for plaintiff, I think it clearly appears that the action of the courts and of the parties was based upon the pleading, which was held to operate as an estoppel.¹ Especially is this true of *Philadelphia, Wilmington & Baltimore R. R. Co. vs. Howard*, 13 Howard, 308, where the plaintiff brought an action of assumpsit upon an instrument which the defendant insisted was a sealed instrument; and upon this plea the defendant obtained a judgment, to the effect that the action of assumpsit

¹ *Kelley vs. Eickman*, 3 Wharton's Reports, 419; *Campbell vs. Stephens*, 66 Pennsylvania State, 314; *Presbyterian Congregation vs. Williams*, 9 Wendell, 148.

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would not lie. The plaintiff bringing a second action of covenant, it was held that the defendant was estopped to deny in that action that the instrument was a sealed instrument, because, in the first action, the claim of the defendant not only induced the plaintiff to bring the second action, but defeated the first, by asserting and maintaining the paper in controversy to be the deed of the company. This was clearly a case of estoppel *in pais*.

The case of *Sheppard vs. Hamilton*, 29 Barbour, 156, was strongly urged by plaintiff's counsel at the trial, and again in argument of this motion. The facts were these: Whittlesey held a note of \$1,000, made by Emery and Peter Thayer. The defendant, Hamilton, became legally bound to Emery Thayer to pay this note. Subsequently, Hamilton negotiated with Whittlesey an extension of time for the payment of the \$1,000, and consummated the same by delivery to Whittlesey of a note for \$1,000, made by himself and J. A. Hamilton, to the order of Henry Decker, and indorsed by Decker; and Whittlesey thereupon gave up the Thayer note to the defendant, who delivered it to Thayer. The substituted note not being paid when due, the plaintiff, having become possessed by assignment of all the interest of Whittlesey in both notes, commenced an action on the last note against the makers and indorser. The defendants put in a verified answer, alleging a usurious agreement between Whittlesey and the defendant, Hamilton. The plaintiff, on the coming in of this answer, discontinued his action and began another action on the first note. *Held*, that in the action on the first note, the defendant should not be permitted to deny that what he alleged under his oath in the previous action was true. Here it seems apparent that, relying upon the allegation of usury made by the defendants in the first action, the plaintiff acted upon it, discontinued and abandoned his action, and brought a new action on the original note to avoid the alleged usury, and solely because of the plea of usury. Here was a clear ground for application of the principle of equit-

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able estoppel. Moreover, in that case, the plaintiff was the transferee of Whittlesey. He was not a party to the alleged usurious agreement. The usury sprang from the contract between Whittlesey and Hamilton, and the plaintiff was a stranger to it, and when the defendants plead it, the plaintiff could rightfully rely upon the plea as cause for withdrawal of his suit. But in the case at bar, the plaintiff and defendant were the identical parties to the record of the Michigan judgment, and the plaintiff must be presumed to have had equal knowledge with the defendant of the validity of that record and judgment. If it appeared here that the plea of *nul tiel record* occasioned and was the cause of the non-suit taken by the plaintiff in the action on the Michigan judgment, if the record showed that the plaintiff relied and acted upon that plea, the principle would be applicable that "when the ground taken by either party to a suit is prejudicial to the other by cutting him off from a good defense, or precluding a recovery on a valid cause of action, it will bind the party who adopts it by an equitable estoppel."

In any view I can take of this question, I am unable to reach a different conclusion from that arrived at on the trial.

Motion for new trial denied.

In re Roddin & Hamilton.

In re RODDIN & HAMILTON.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY,
1875.

IN BANKRUPTCY.

BOND BY PARTNERS—DISTRIBUTION.—A claim on a bond signed individually by the members of a firm, but not for a firm debt or obligation, is not entitled, as against partnership creditors, to be paid in bankruptcy from the partnership assets. It is a joint, but not a partnership debt.

Appeal from the district court by William E. Hale, assignee of Roddin & Hamilton, bankrupts, against Marietta A. Roddin, wife of the senior member of the firm. Mrs. Roddin had obtained a decree in the Superior Court of Cook county, for alimony in a divorce case against her husband, and Roddin and Hamilton, who were partners, both executed a bond for the due payment of the amount of the decree. Roddin & Hamilton going into bankruptcy, Mrs. Roddin proved up her claim for alimony against the estate, claiming that she was entitled to be paid out of the partnership assets *pro rata* with the other creditors of the partnership.

Charles Hitchcock, for the partnership creditors, cited:

In re The Bucyrus Machine Company, 5 Bankruptcy Register, 303; *In re Webb and Johnson*, 2 do., 614; *Ex parte Weston*, 12 Metcalf, 1; *Forsyth vs. Woods*, 11 Wallace, 484.

George L. Paddock, for Mrs. Roddin, cited:

In re Melick, 4 Bankruptcy Register, 26; *Mead, Assignee*,

In re Roddin & Hamilton.

etc., vs. National Bank of Fayetteville, 2 do., 173; Collyer on Partnership, 616; *In re Kahley*, 2 Bissell, 383; *Hapgood et al. vs. Cornwell et al.*, 48 Illinois, 64.

DRUMMOND, J.—The claim of Mrs. Roddin against Roddin & Hamilton is not entitled to be paid out of the partnership assets equally with the claims of creditors of the firm, but the creditors of the copartnership have the right to be paid out of the partnership assets in preference. Though the claim of Mrs. Roddin is a joint debt, yet it is not a firm debt; and though the joint or separate property of the partners could be applied to the payment of her claim, the property of the firm must first go to pay the firm debts. The assignee is directed to act in accordance with this opinion.

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UNITED STATES *vs.* THREE TONS OF COAL, ETC.

DISTRICT COURT.—EASTERN DISTRICT OF WISCONSIN.—JULY, 1875.

1. **FORFEITURE AGAINST DISTILLERY.**—A proceeding against a distillery for forfeiture under the revenue laws, is not a criminal proceeding within the meaning of the Constitution.

2. The true test is, whether the judgment is of punishment, against the person, or of forfeiture, against the *res*.

3. Section 860 of the United States Revised Statutes is modified and partially repealed by the act of June 22, 1874.¹

4. **CONSTRUCTION.**—The Revenue law is not, properly speaking, a penal statute to be construed with strictness in favor of the defendant.

5. If the legislative protection against a witness' evidence being used against himself, is as broad as the constitutional provision against compelling a person to criminate himself, he can be compelled to answer.

6. **POWER OF GOVERNMENT.**—The complete superintending control of the business of distillers and rectifiers is exercised by the Government, and when they enter the business they contract to submit to this Governmental surveillance.

7. **PERSONAL AND CONSTITUTIONAL RIGHTS.**—It is no infringement of personal or constitutional rights for the government, under the act of June 22, 1874, to require the production of, and, if necessary, seize any or all the books and papers kept by them in their business. They are not such private property as to be exempt from seizure and search, nor are they protected by the rules against obtaining from a party evidence to be used against himself. The Government has really an interest in such business, as affecting the public revenues.

8. The discretion of the court in requiring books and papers to be produced, should not be exercised in favor of the claimants, when no special circumstances are shown by them.

9. **CERTAINTY OF DESCRIPTION.**—The books and papers are not required to be more specifically described than as those used and kept in their business as distillers or rectifiers, between certain dates named.

10. **PRESENCE OF CLAIMANTS.**—The claimants and their counsel have the right to be present at the examination of their books and papers.

11. Many cases cited and commented upon.

¹ U. S. Revised Statutes, 1874, 163.

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J. C. McKinney and L. S. Dixon, for United States.

Matt. H. Carpenter, for claimants.

DYER, J.—Informations having been filed in this court, on behalf of the United States, in several causes of seizure under the internal revenue laws, orders were made requiring the claimants in the respective cases, to produce certain books and papers, for examination by the attorneys of the United States. On the day named in the orders for the production of these books and documents, the claimants appeared by their counsel to contest the right of the government to take these proceedings, and in the case of Schœnfeld, who is alleged to be a rectifier of distilled spirits, moved to vacate the order previously made in that case. The act of June 22, 1874, to "amend the customs revenue laws and repeal moieties,"¹ provides in the fifth section, "That in all suits and proceedings, other than criminal, arising under any of the revenue laws of the United States, the attorney representing the government, whenever, in his belief, any business book, invoice or paper belonging to or under the control of the defendant or claimant, will tend to prove any allegation made by the United States, may make a written motion particularly describing such book, invoice or paper, and setting forth the allegation which he expects to prove; and thereupon the court in which suit or proceeding is pending may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice, or paper in court, at a day and hour to be specified in said notice, which, together with a copy of said motion, shall be served formally on the defendant or claimant by the United States marshal by delivering to him a certified copy thereof, or otherwise serving the same as original notices of suit in the same court are served; and if the defendant or claimant shall fail or refuse to produce such book, invoice, or paper, in obedience to such notice, the allegations stated in the said motion shall be taken as confessed unless his failure

¹ 18 U. S. Statutes at Large, 186.

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or refusal to produce the same shall be explained to the satisfaction of the court. And if produced, the said attorney shall be permitted, under the direction of the court, to make examination (at which examination the defendant or claimant, or his agent, may be present) of such entries in said book, invoice, or paper as relate to or tend to prove the allegation aforesaid, and may offer the same in evidence on behalf of the United States. But the owner of said books and papers, his agent or attorney, shall have, subject to the order of the court, the custody of them, except pending their examination in court as aforesaid."

It is under this section of the act of 1874 that these proceedings for the production of the books, papers and documents specified in the order are prosecuted.

The fourth amendment of the Constitution of the United States provides, that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated." The fifth article declares that no person "shall be compelled, in any criminal case, to be a witness against himself;" and it is insisted that the section of the revenue law before quoted is in conflict with the guaranty of rights embodied in these amendments, and therefore void.

The question has been argued by eminent counsel with a learning and ability commensurate to its importance. On the one hand it is contended that in this proceeding there is threatened an invasion of the most sacred rights of the citizen—rights protected by the solemn guaranties of the Constitution—rights that no emergency of government can justify the courts in disregarding, and an appeal has been made such as is seldom heard at the bar, that the hand of the government may be stayed, and the exercise of what is termed arbitrary power may be restrained in these proceedings, where such restraint will, as it is urged, directly operate as an enforcement of constitutional rights. On the other hand it is contended, with equal earnestness, that the power sought to be exercised

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here is directly incidental to the power conferred by the Constitution, "to lay and collect taxes, duties, imposts and excises;" that no violation of any constitutional privilege is involved, and that the right of Congress to pass the law in question, is beyond dispute.

First, in seeking a general principle needful for guidance, the language of Chief Justice Marshall may be accepted as in the highest degree authoritative:

"The question whether a law be void for its repugnancy to the Constitution, is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligation which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

Relieved of its verbiage, the statute in question, in terms provides, that in any proceeding other than criminal, arising under any of the revenue laws of the United States, the court in which such proceeding is pending, may at its discretion, on motion of the government attorney, require the claimant or defendant, to produce for examination, any business book, invoice or paper, belonging to or under the control of such claimant or defendant, and which, in the belief of the attorney, will tend to prove any allegation made by the United States; and on failure to produce the books and papers required, the allegations of the government may be taken as confessed. In determining whether this act of Congress is repugnant to the amendments of the Constitution which have been cited, the question may be resolved into two main inquiries, to which other points presented are incidental:

First: Are the suits or the proceedings in which these in-

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formations have been filed, and in which these orders were made, criminal cases within the meaning of the constitutional provision?

Second: Are the books and papers called for of such a character, as the private property of the claimants, as to be secure from search and examination by the attorneys for the government?

The spirit of the constitutional prohibition against unreasonable searches and seizures, has its source in that principle of the common law which finds expression in the maxim that "every man's house is his castle." English history discloses as the original occasion for constitutional provisions on the subject, that they had their origin "in the abuse of executive authority, and in the unwarrantable intrusion of executive agents into the houses and among the private papers of individuals, in order to obtain evidence of political offenses."¹ The struggle in England against the right of seizing private manuscripts and papers, on warrants of search, began substantially with the resistance of Wilkes to the warrants of Lord Halifax, which culminated in the action of Wilkes against Wood, the under secretary of state. In that action, Lord Chief Justice Pratt said: "The defendant claimed a right under precedents, to force persons' houses, break open escritaires, and seize their papers upon a general warrant, where no inventory is made of the things thus taken away, and where no offenders' names are specified in the warrant, and therefore a discretionary power given to messengers to search wherever their suspicions may chance to fall. If such a power is truly invested in a secretary of state, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject."

The case of *Entick vs. Carrington*, 19 Howell's State

¹ Cooley's Constitutional Limitations, 800.

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Trials, 1030, cited by claimant's counsel, marks another step in the struggle, made in England against the right to seize private papers. That was the case of a warrant to search for and seize the papers of the accused, in the case of a seditious libel, Lord Camden delivering the judgment of the court. He says of the great point involved in that cause, that if it "should be determined in favor of the jurisdiction, the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel. * * * * * There is no process against papers in civil causes. It has been often tried, but never prevailed. * * * In the criminal law, such a proceeding was never heard of, and yet there are some crimes, such, for instance, as murder, rape, robbery and housebreaking, to say nothing of forgery, and perjury that are more atrocious than libeling. But our law has provided no paper search in these cases to help forward the conviction." Again he says, in the same judgment, "the great end for which men entered into society was to secure their property; that right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law, are various. Distresses, executions, forfeitures, taxes, etc., are all of this description, wherein every man, by common consent, gives up that right for the sake of justice and the general good."

It was thus judicially determined in England, that warrants for the seizure of private papers, were illegal at the common law, and the action of Parliament was not in conflict with judicial adjudication. The precise principle established was, that the citizen in his home shall have protection in his person and his papers, even against the process of the law, except

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in certain cases.¹ Chatham in his speeches on general warrants declared the scope and application of the principle, when he said, "the poorest man may, in his cottage, bid defiance to all the forces of the crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the king of England may not enter; all his force dares not cross the threshold of the ruined tenement."

Other decisions, many of which were cited on the argument, and some of which will be particularly noticed, accomplished the permanent overthrow in England, of the right at common law to search for and seize the private papers of the citizen, for the purpose of convictions for crime, or for the purpose of recovery in civil causes, where the evidence when produced would convict of a felony.² It is to be remarked, that in nearly all of these cases the attempt was made in prosecutions upon information or indictment for crime, to compel the production of the papers of the accused as ground for conviction. The proceeding was direct, and its character as a "criminal case" was clear. The case of *Huckle vs. Money*, 2 Wilson, 205, was one in which a warrant was granted by Lord Halifax, secretary of state, directed to four messengers to apprehend and seize the printers and publishers of a paper called the North Briton, No. 45. The action was trespass and the jury gave £300 damages. The Lord Chief Justice held the damages not excessive, and ordered the verdict to stand, laying stress upon the point that the warrant was granted without any information or charge laid before the secretary of state, previous to the granting thereof, and without naming any person whatsoever in the warrant, and was a violation of Magna Charta. Other cases in England

¹ Cooley on Constitutional Limitations, 800.

² *Rex vs. Dizon*, 8 Burrows, 1687; *Rex vs. Dr. Purnell* (Vice Chancellor of Oxford), 1 Wilson, 289; *Regina vs. Mead*, 2 Lord Raymond, 927; *Rex vs. Cornelius*, 2 Strange, 1210.

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will be hereafter noticed in a branch of the case which will arise for consideration.

The common law rule upon this subject was thus established in England, and thus it existed and was the law of that realm, when the American colonies were organized, and when this government was formed. Under the shelter of judicial decision, the subject became secure in his person, papers and effects, against unreasonable searches and seizures, and could not be compelled to accuse himself.

The Constitution of the United States, as originally adopted and ratified by the states, containing no provision expressing the principle of personal protection against searches, seizures, etc., amendments were proposed by Mr. Madison at the first session of the First Congress. The purpose of these amendments has been somewhat discussed upon the argument. High authority says that they were mainly in the nature of a declaration of rights, placing the freedom of speech, the freedom of the press, freedom of religion, the security of property, personal liberty, trial by jury, and in general every right and power of the people not delegated or surrendered, under the ægis of the Constitution, and by an express interdiction beyond the reach of the government.¹ The debates in Congress show that the purpose of the amendments, in the view of Mr. Madison, was, to render the Constitution as acceptable to the whole people of the United States, as it had been found to be to a majority of them, and that without impairing the powers of the Constitution, apprehensions for the public liberty would be quieted, and the great body of the people would be united in support of that instrument. That part of the fifth amendment, discussed here, originally proposed by its author, was in the following language and stood in this connection:

“No person shall be subject, except in cases of impeachment,

¹ Rives' Life and Times of Madison, 39-40.

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to more than one punishment or one trial for the same offense, nor shall be compelled to be a witness against himself, nor be deprived of life, liberty or property without due process of law, etc.”

The debates upon this clause show that it was objected to because it “contained a general declaration in some degree contrary to laws passed. The member objecting alluded to that part where a person shall not be compelled to give evidence against himself. He thought it ought to be confined to criminal cases, and moved an amendment for that purpose, which amendment being adopted, the clause as amended was unanimously agreed to.”¹

So we find it to have been the clear intent of the framers of the amendment, as disclosed not only in its language, but in the original debates, to restrict the provision to criminal cases, and with the adoption of the fourth and fifth amendments, principles established at the common law became reaffirmed in the Constitution.

I have referred at some length to the history of the law upon this subject, and to these amendments, because it was considerably dwelt upon in the argument, and it is important that in considering the present question, we do not mistake the character of the case and the state of facts to which the law in its design and scope should be applied.

What then are the cases we have here? Seizures of certain distilleries and rectifying establishments having been made by the government, for alleged violations of the internal revenue laws by distillers and rectifiers of distilled spirits, informations have been filed, upon which forfeitures of the property seized are sought to be enforced. The proceedings as they stand are against the property, are strictly *in rem*, and from their nature can be nothing else. They are as emphatically proceedings *in rem*, as a libel against a vessel. By the

¹ Annals of Congress, Vol. 1, p. 782.

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internal revenue laws of the United States, certain violations of those laws involve a forfeiture of the property employed, and may also involve punishment of the offending parties by fine and imprisonment. The second section of the act of March 2, 1867,¹ authorized the seizure of books and papers, where complaint was made of the commission of frauds on the revenue. By the act of June 22, 1874, the fifth section of which has been quoted, the second section of the act of 1867, authorizing seizure of books and papers, was repealed; and in its place was enacted the section in question, providing for the production of books under compulsory process, "in all suits and proceedings other than criminal, arising under the revenue laws," which of course included suits for penalties and forfeitures. So that in place of any legislative authority for the seizure of books and papers, we have the statute and proceeding for compulsory production of books and papers now under consideration.

Section 860 of Revised Statutes of United States provides that "No pleading of a party, nor any discovery or evidence obtained from a party or witness, by means of a judicial proceeding in this or any foreign country shall be given in evidence, or in any manner used against him or his property or estate in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture."²

Undoubtedly so much of this section as relates to the use of evidence against a party for the enforcement of a penalty or forfeiture is repealed by the act of 1874, which requires the production of books and papers by compulsory process, in any proceeding other than criminal, arising under the revenue laws. If section 860 were now in full force in its original terms there is little doubt the books and papers of these claimants could not be used against them, because they would then be evidence obtained from the claimants by means of a judi-

¹ 14 U. S. Statutes at Large, 547.

² U. S. Revised Statutes 1874, 162.

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cial proceeding for the enforcement of a forfeiture. In the case of the *United States vs. George Hughes et al.* (unreported) Judge Blatchford excluded the books and papers of the defendants, seized upon warrant issued under the second section of the act of March 1867, because, in the language of section 860, of the Revised Statutes, they were evidence obtained from the defendants by means of a judicial proceeding in a suit for the enforcement of penalties. That was a case arising before the passage of the act of 1874, which we are here considering. In a subsequent endeavor to apply to that case the act of 1874, Judge Blatchford held that so far as it applied to that action, it was an *ex post facto* law, and therefore unconstitutional and void, limiting his decision, however, to that point, and not intending, as he says, to express any opinion about that act, in its applicability to cases arising after its passage.

We have here, then, a judicial proceeding against certain property, for the enforcement of a forfeiture, the ground of the proceeding being alleged violation of the revenue laws of the United States. We have a constitutional provision, declaring that no person shall be compelled in any criminal case, to be a witness against himself; a statute authorizing compulsory process for the production of the books and papers of a claimant or defendant in any proceeding other than criminal, arising under the laws relating to revenue, and a further statute that no discovery or evidence obtained from a party, by means of a judicial proceeding, shall be in any manner used against him in any court of the United States, in any criminal proceeding.

The question now arises: Is the proceeding for the forfeiture of this property a criminal case, within the meaning of the Constitution? It is argued that the construction of the constitutional provision should not be limited; that as some of the alleged violations of the revenue law involve not only punishment by forfeiture, but punishment, also, by fine and imprisonment, after conviction or indictment, this case is criminal

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in its character, within such a construction as the constitutional provision should have. The rule of constitutional construction is thus laid down by Chief Justice Marshall: "The intention of the instrument must be collected from its words; its words are to be understood in that sense in which they are generally used, by those for whom the instrument was intended; its provisions are neither to be restricted into insignificance nor extended to objects not comprehended in them, nor contemplated by its framers."

I have said that these are proceedings *in rem*; and it should be noticed that the cases are not like those where a forfeiture of property and a punishment by fine and imprisonment may be adjudged in the same action. Of the kind of forfeiture provided for in the statute relating to revenue, it may be said, that it is a punishment which "falls on the thing as respects ownership; and it does not visit the owner's person. Though he loses the thing, which lapses to another or the state, the loss is not in the nature of a penalty for personal crime.¹ There is another kind of forfeiture, which happens when a person on conviction is sentenced to forfeit specific articles of property, instead of, or in addition to a fine. This class of forfeitures rests upon the precise principle of fines; there are also the cases of forfeiture of an office, or of the capacity to hold an office, imposed upon the person as a punishment, which must be distinguished from the kind of forfeiture we are now considering, and I think a correct apprehension of this distinction clears away many difficulties. The forfeitures we are here dealing with are such as are created by statute to enforce revenue laws, kindred to forfeiture of property used in illicit trade, to forfeitures of seamen's wages on desertion of the ship, to forfeitures incurred by violations of embargo laws.

Mr. Bishop, in his work on Criminal Law, 4th Ed., Vol. 1, sections 702 and 709, says:

¹ 1 Bishop's Criminal Law, Section 816.

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"The object of these forfeitures, or, more accurately, the law's motive for inflicting them, may be akin to the peculiar spirit of either the criminal law or the civil. But whether the one or the other, the forfeiture proceeds in a way of its own, drawing its sustenance from a principle of its own, peculiar neither to the one nor to the other of these two great departments of our law. It is neither a punishment for crime, even though a crime is committed when it is incurred; nor a damage awarded for a civil injury, even though a civil liability follows the act which produces it. * * * *

Whenever the law, statutory or common, creates a forfeiture of property by reason of particular circumstances attending it, or of its peculiar nature, as being dangerous to the community—by reason of any form or position which it assumes—this forfeiture is not to be deemed a punishment inflicted on its owner in the criminal law sense, and within constitutional guaranties protecting persons who are accused of crime. *

* * * But if the law provides that a person shall forfeit property A. for what property B. does, or for what the owner does, in a matter not connected with the property, or for a bare intent, which does not enter into the situation and conduct of the property, the forfeiture is a punishment, which can be inflicted only on conviction of the owner, for his act or intent viewed as a crime."

I think the distinction thus indicated is grounded upon principle; and it is, in my judgment, most satisfactorily illustrated in a case not cited upon the argument, decided by Justice Story. I refer to the case of *The Palmyra*, 12 Wheaton, 1. Justice Story says: "It is well known that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown. The forfeiture did not, strictly speaking, attach *in rem*; but it was a part, or at least a consequence, of the judgment of conviction. It is plain from this statement that no right to the goods and chattels of the felon could be acquired by the crown, by the mere commission of the offense; but the right attached only by the con-

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viction of the offender. The necessary result was, that in every case where the crown sought to recover such goods and chattels, it was indispensable to establish its right by producing the record of the judgment of conviction. In the contemplation of the common law, the offender's right was not divested until the conviction. But this doctrine never was applied to seizures and forfeitures created by statute, *in rem*, cognizable on the revenue side of the exchequer. The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing,—and this whether the offense be *malum prohibitum* or *malum in se*. The same principle applies to proceedings *in rem*, on seizures in admiralty. Many cases exist where the forfeiture for acts attaches solely *in rem*, and there is no accompanying penalty *in personam*. Many cases exist where there is both a forfeiture *in rem* and a personal penalty. But in neither class of cases has it ever been decided that the prosecutions were dependent upon each other. But the practice has been, and so this court understand the law to be, that the proceeding *in rem* stands independent of and wholly unaffected by any criminal proceeding *in personam*."

Now, applying this doctrine to the cases at bar, I think I speak with accuracy when I say, that in these proceedings, the distilleries and other property in question are the things which (if any offense at all has been committed) are to be primarily considered as the offenders, or rather the offenses, if any, attach primarily to them, and that these proceedings *in rem* stand independent of and wholly unaffected by any criminal proceeding *in personam*. The forfeiture is not, in an apt and legal sense, a punishment for crime, even though a crime be committed when the forfeiture is incurred. The true test, I think, lies here. When the judgment of forfeiture necessarily carries with it and as part of it a conviction and judgment against the person for the crime, the case is of criminal character. But when the forfeiture does not necessarily involve personal conviction and judgment for the offense, and

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such conviction and judgment must be obtained, if at all, in another and independent proceeding, there the remedy by way of forfeiture is of civil and not criminal nature. Understanding the words "criminal case," in the Constitution in the sense in which they are generally used, and upon the views already indicated, I must construe them as meaning a case in which punishment for crime is sought to be visited upon the person of the offender, in the ordinary course of criminal prosecution, in contradistinction to a proceeding *in rem* to effect a forfeiture of the thing to which the offense primarily attaches.

Discussion was had in the course of the argument upon the question, as to whether the statute for enforcement of forfeitures in cases like the present was a penal or remedial statute. In the case of *United States vs. Breed et al.*, 1 Sumner, 159, 160, Justice Story says: "Revenue and duty acts are not, in the sense of the law, penal acts, and are not therefore to be construed strictly. Nor are they, on the other hand, acts in furtherance of private rights and liberty, or remedial, and therefore to be construed with extraordinary liberality. * *

* * * We are not to strain to reach cases not within their terms, even if we might conjecture that public policy might have reached those cases; nor, on the other hand, are we to restrain their terms, so as to exclude cases clearly within them, simply because public policy might possibly dictate such an exclusion." In the case of *Taylor vs. United States*, 8 Howard, 197, the Supreme Court of the United States has said, "in one sense, every law imposing a penalty or forfeiture may be deemed a penal law; in another sense, such laws are often deemed, and truly deserve to be called, remedial. It must not be understood that every law which imposes a penalty is therefore, legally speaking, a penal law, that is, a law which is to be construed with great strictness in favor of the defendant. Laws enacted for the prevention of fraud, for the suppression of a public wrong, or to effect a public good, are not in the strict sense penal acts, although they may inflict a penalty for violating them. It is in this light we view

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the revenue laws, and we would construe them so as most effectually to accomplish the intention of the legislature in passing them." Such are the views of the court of last resort, and they must have weight here. Whether the statute referred to be penal or remedial, I do not think decisive of the question in dispute. But within the definitions given I construe it as bearing more a remedial than a penal character.

Two cases have been cited on the argument, as in antagonism to each other upon the question under consideration. *Emery's Case*, 107 Massachusetts, 172; *The People ex rel. Hackley vs. Kelley*, 24 New York, 74. The stress laid upon the last-named case by the counsel for the government, and the earnestness with which the Massachusetts case is pressed by counsel for the claimants, justifies a somewhat close analysis of both cases.

The constitution of the state of New York provided, in the identical language of the Constitution of the United States, that no person "shall be compelled in a criminal case to be a witness against himself." Hackley was a witness before a grand jury, in a matter against certain aldermen of the city of New York, and refused to answer a question, on the ground that an answer would disgrace him and have a tendency to accuse him of crime. The question was, whether he could so lawfully refuse. There was a statute of the state which provided that testimony so given should not be used in any prosecution or proceeding, civil or criminal, against the person so testifying. Judge Denio held that Hackley was not protected by the Constitution from being compelled to give the testimony called for, though it might implicate him in a crime, as he was fully protected by statute, against the use of such testimony, on his own trial. He says: "It is perfectly well settled, that where there is no legal provision to protect the witness against the reading of the testimony on his own trial, he cannot be compelled to answer."¹ This course of adjudica-

¹ *The People vs. Mather*, 4 Wendell, 280.

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tion does not result from any judicial construction of the Constitution, but is a branch of the common law doctrine, which excuses a person from giving testimony which will tend to disgrace him, to charge him with a penalty or forfeiture, or to convict him of a crime. It is of course competent for the legislature to change any doctrine of the common law, but I think they could not compel a witness to testify on the trial of another person, to facts which would prove himself guilty of a crime, without indemnifying him against the consequences, because, I think, as has been mentioned, that by a legal construction the Constitution would be found to forbid it."

In the Massachusetts case, Emery, in obedience to summons, appeared as a witness before a joint special committee of the senate and house of representatives of the general court, to inquire if the state police was guilty of bribery and corruption. In the course of his examination, he was asked this question: "Have you ever paid any money to any state constable, and do you know of any corrupt practice or improper conduct of the state police? If so, state fully what sums and to whom you have thus paid money, and also what you know of such corrupt practice and improper conduct." He declined to answer, on the grounds that the answer would accuse him of an indictable offense, and would furnish evidence against him by which he could be convicted of such an offense. The constitution of Massachusetts provided that "no subject shall be held to answer for any crime or offense until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse or furnish evidence against himself." The dissimilarity in terms between this provision and that in the Constitution of the United States, which is, that no person "shall be compelled in any criminal case to be a witness against himself," is, at a glance, apparent. The statute under which Emery was required to testify undertook to secure him against the use of any disclosures he might make, as admissions or direct evidence against him, in any civil or criminal proceeding. Now the point of the decision in this case

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was that, as the constitution of the commonwealth in broad and unlimited terms provided that no subject should be compelled to accuse or furnish evidence against himself, the statute securing Emery from future liability should be as broad as the constitutional shield; and as it was not, and as it did not protect him from the indirect and incidental consequences of a disclosure, he was relieved from obligation to answer the question. In the opinion of the court, Justice Wells says that no one can be required to forego an appeal to the protection of the Constitution, "unless first secured from liability and exposure to be prejudiced in any criminal proceeding against him as fully and extensively as he would be secured by availing himself of the privilege accorded by the Constitution. * * * * * This cannot be accomplished so long as he remains liable to prosecution, criminally, for any matters or causes in respect of which he shall be examined, or to which his testimony shall relate. It is not done in direct terms by the statute in question; it is not contended that the statute is capable of an interpretation which will give it that effect, and it is clear that it cannot and was not so intended to operate. Failing, then, to furnish to the persons to be examined an exemption equivalent to that contained in the Constitution, or to remove the whole liability against which its provisions were intended to protect them, it fails to deprive them of the right to appeal to the privilege therein secured to them." And so it was held that Emery, in refusing to answer the question put, was in the exercise of a constitutional right. The court refer to the case of *People vs. Hackley*, 24 New York, 74, in their opinion. I do not understand that they intend to express any dissent to the doctrine laid down in that case; for Justice Wells says that the terms of the provision in the constitution of Massachusetts require a much broader interpretation than the terms of the provision in the constitution of New York, which, as we have seen, were identical with the provision in the Constitution of the United States.

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Like the statute of New York, cited in *The People vs. Hackley*, the statute of the United States declares that no evidence obtained from a party by means of a judicial proceeding, shall be in any manner used against him in any criminal proceeding. With this legislative protection, as ample as the terms of the Constitution itself, I think it cannot be successfully asserted, as was done in the Massachusetts case, that the party is not as fully secured as he can be from future liability in a criminal proceeding.

Counsel for claimants cited *Cattell vs. Ireson*, 96 English Common Law, 90. In that case, the defendant was charged upon information, with the unlawful use of two snares, for the purpose of taking game on certain land, not being authorized so to do, for want of a game certificate; and it was held in that case, that the party charged was not compellable to give evidence against himself. Lord Campbell, Chief Justice, and the other judges place their decision distinctly upon the ground that the information was a criminal proceeding, for an offense punishable on summary conviction; that the legislature had made the act a crime, punishable by fine or imprisonment, and the case is expressly distinguished from a fiscal proceeding, or a proceeding for a civil right, or for a wrong done to the party applying.

In *Greene vs. Briggs et al.*, 1 Curtis' Reports, 311, liquors of the plaintiff had been seized, on the ground that they were kept and deposited for purposes of sale contrary to law. The penalty in such a case was forfeiture and destruction of the property, and fine or imprisonment, and the forfeiture and punishment by fine or imprisonment were necessarily imposed in the same action; and the court hold the proceedings criminal in their nature, their object being "to inflict upon the person fine or imprisonment, and at the same time to adjudicate a forfeiture of the liquors. The process and the judicial action under it, are directed both against the offender and his property, and it is held that it is not possible to separate

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the proceedings under the act against the property from the proceedings against the person.

The case of *Fisher vs. McGirr et al.*, 1 Gray, 1, was similar in character to *Greene vs. Briggs*, the forfeiture and punishment by fine or imprisonment, for violation of the law, being enforceable in the same action. The statute was held unconstitutional, because it provided for the destruction of private property and the punishment of its owner without charging him with any offense, or giving him opportunity to defend and meet the witnesses face to face. It may be said of this case, and of that in 1 Curtis, that the forfeiture provided for was, conjointly with fine or imprisonment, clearly made a punishment for a criminal offense. It was a forfeiture which was by the statute itself made to depend alone upon an intent in the mind of the owner of the property, which, as Mr. Bishop points out in his Criminal Law, Vol. 1, §§ 702, 709, is to be distinguished from a forfeiture resulting from particular circumstances attending property, imposed sometimes with and sometimes without a conviction of the owner for crime.

Obviously there cannot be a complete determination of the rights of the parties to these proceedings without considering the remaining question, which touches the character of the books and papers claimed by the respondent's counsel to be protected against search and examination. We have seen that the principle of the common law in relation to searches and seizures was established for the protection of purely private rights, and for the security against public use of private papers; that it was aimed as a prohibition against the unwarrantable intrusion into private houses of executive agents, and searches upon mere suspicion by messengers armed with general warrants. We have seen, also, that it was this principle that was incorporated into the Constitution, and it is all important that the meaning of the principle, and the real purpose for which it was originally invoked by the citizen and asserted by the courts, be not lost sight of; for even in

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some of the English cases cited upon the argument, distinctions are drawn that must not be overlooked.

In *Prichett vs. Smart*, 62 English Common Law, 625, the action was assumpsit on a bill of exchange drawn by one Williams upon, and accepted by, the defendant, and by Williams indorsed to the plaintiff, a sworn broker of London. The statute required every broker to keep a book of all contracts, agreements and bargains made by him. The defendant made application to require the plaintiff to produce his broker's books, and the real ground of the decision is, that the defendant had no direct interest in the book, and that if the plaintiff could be required at all to produce the book, it could only be done at the instance of his principal. It was held that the defendant was not a party to any of the transactions presumed to be entered in the book, nor was it held by the plaintiff as a trustee for him.

In *Crew qui tam vs. Saunders*, 2 Strange, 1005, an action was brought against the defendant on the statute for intermeddling in elections, being postmaster at Nantwich. It was moved in behalf of the plaintiff for liberty to inspect the postoffice books and take a copy of his deputation. The court said that the origin of such motions was in the inspection of court rolls; "but then it was confined to the case of persons interested, the rolls being the common evidence, which of necessity must be kept in some one hand. But lords and tenants of different manors have always been denied, as strangers. In the case of public companies, it is restrained to the entry which concerns the party himself." The plaintiff took nothing by his motion.

In *Regina vs. Mead*, 2 Lord Raymond, 927, the defendant and others were incorporated by the name of surveyors of certain highways and were trustees of a charity called Bedford's gift. An information was preferred against the defendant for executing his office without having taken the oaths. A rule was moved for, that two books might be produced which the surveyors kept, in which they entered their elec-

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tions, and their receipts and disbursements. The rule was denied, because the books were "perfectly of a private nature," and moreover the prosecution was purely criminal.

Now, as a source of revenue for the maintenance of the government, Congress has enacted a law imposing certain taxes on distilled spirits, and for the purpose of enforcing payment of such taxes, has established a system, rigorous in its features and in many instances arbitrary in its operation, under which distilled spirits shall be manufactured and rectified. The law is a complete regulation of the business. To engage in the business except under statute regulation and government surveillance, is absolutely forbidden. The preliminary circumstances under which the business can be entered upon, are prescribed to the remotest detail. Applications must be made, notices and bonds must be given. The location of the establishments, with all mechanical arrangements for operating them, are prescribed, the days and hours of business, and the quantity of grain for every gallon of production are fixed, and government officers, consisting of gaugers and storekeepers, hold the keys and control the locks and seals of the furnaces, rooms, wine cisterns and storehouses, appertaining to the establishments, and employed in the business. It is only under the rigid observation and control of these officers that spirits can be removed from one location to another, and that the owner can exercise his rights of disposition and sale. By the express terms of the law, books must be kept, showing the conduct of the business in all its details, which books are required to be always open to the inspection of the officers, and at specified times accounts must be rendered to the government from these books, and the bond which must be given is conditioned that all of these and many more provisions of law shall be faithfully complied with. All these requirements of the law are fully set out in the case of *United States vs. Singer*, 15 Wallace, 118, where it is said that "the system thus adopted was designed to prevent the secret production of spirits and consequent evasion

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of the government tax * * * * In view of the enormous frauds previously practiced upon the government, in rendering accounts, this system cannot be justly charged with unnecessary harshness." And in this case, and in the cases of *The Collector vs. Beggs*, 17 Wallace, 182, and *Pahlman vs. The Collector*, 20 Wallace, 189, it is substantially held, that the producing capacity of the distillery, as fixed by the law, is the basis of taxation, rather than the actual cost of production. It may be said that these provisions of law are anomalous and severe, depriving parties of that control of their own business which every citizen should be permitted to enjoy. Undoubtedly it is true that the passage of such a law involves the exercise of extraordinary power. But its high purpose is the securing of revenue, and the authority given by the Constitution on this subject is necessarily a great power because the existence of the government is dependent upon its exercise. Mandatory and rigid as the internal revenue law is, in all the provisions referred to, it has been expressly held constitutional by the Supreme Court of the United States in the case of the *United States vs. Singer*, 15 Wallace, 111. In view of the provisions of the statute, it cannot be denied that complete superintending control of the business of distillers and rectifiers is exercised by the government, as was held by Judge Blodgett in his recent decision.¹ I think that it is not an exaggerated statement to say that the distiller and rectifier, when they enter upon the business, contract that they will submit to this governmental surveillance. The method in which the business must necessarily be done, places the government in the position of a party in interest, to the extent of securing revenue therefrom, and the distiller and rectifier consent to this participation in interest.

Statutes of this character have existed almost from the

¹ *Ante* p. 350.

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foundation of the government. In 1791, which was not long subsequent to the adoption of the amendments to the Constitution, Congress passed an act which is the very parallel of the present act in many of its provisions, and which authorized inspections, searches and seizures, and required books to be kept by distillers, subject to government inspection.¹ In the matter of the petition of *Platt and Boyd*, 19 Internal Revenue Records, 132, Judge Blatchford in a very elaborate opinion holds that "the searches and seizures authorized by the 2d section of the act of March 2, 1867, are not repugnant to the fourth or fifth amendments to the Constitution. A search for and seizure of goods subject to duty, is made part of a system for the recovery of duties, and is a necessary part of such a system; and the books and papers which relate to goods with respect to which frauds are alleged to have been committed, are properly included in such searches and seizures." In this opinion Judge Blatchford fully reviews the history of revenue legislation in this country since 1789, as bearing upon the question of searches and seizures.

In *Stockwell vs. The United States*, 12 Internal Revenue Record, 88, Justice Clifford, at the circuit, sustained the power of seizure of books and papers, upon a review of the law, and even approved the admission of such books and papers in evidence, in a proceeding to recover penalties and unpaid duties. It seems questionable whether section 860 of the Revised Statutes before referred to, was brought to his attention on the point of the admissibility of the books and papers as evidence against the parties charged with violation of the statute. This case was taken to the Supreme Court of the United States,² but the question of the power of seizure was not there raised or passed upon, and on the question of that power alone, it must be regarded only as an authority of judges at the circuit.

¹ Appendix to Vol. 2 of *Annals of Congress*, 2868.

² 18 Wallace, 531.

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In the matter of Meador, 1 Abbott's United States Reports, 317, a summons was issued by a supervisor of internal revenue, under a section of the law authorizing such a proceeding, requiring the production of books and papers. Disobedience of the summons was attempted to be justified under the fourth and fifth amendments to the Constitution, but the court sustained the writ. A similar proceeding was sustained by the district court for the southern district of Mississippi in *Stannwood vs. Green*, 2 Abbott's United States Reports, 184.

Conceding that the power sought to be exercised here is equivalent to the power of seizure, and in the absence of decision by the Supreme Court, I am clear in the conviction that the statute in question is not obnoxious to constitutional objection. This is not an attempt to unreasonably search the private affairs of the citizen. The books and papers called for pertain to the business in which the government, as a supervising power, has an interest, and concerning the conduct of which, as affecting the public revenues, the government is prosecuting the pending proceedings. The cases are not like those condemned by the courts of England where general warrants empowered the officers to enter any private house, and intrude upon the privacy of any citizen and seize private papers or property for purposes of personal prosecution on any charge the crown might choose to make. The power here claimed is one incidental to collection of public revenue. The proceeding is against property which it is claimed is subject to forfeiture because of alleged delinquencies in the use of that property in a business regulated by law. To all the conditions and requirements of that law the claimants subjected themselves when they entered upon the business. It is, in my judgment, no infringement upon their personal rights to require that books and papers used and kept by them in their business as distillers and rectifiers, shall be produced for inspection by the attorneys for the government. And in so holding, I am not unmindful of con-

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siderations pressed by the learned counsel upon the argument. I agree with counsel that, as was declared by the Supreme Court in *Bronson vs. Kinsie*, 1 Howard, 311, the Constitution was not designed to protect a mere barren and abstract right, not affecting the business of life. It was designed for the protection of real and substantial rights; and when the legislative authority infringes upon those rights and transcends its constitutional powers, the duty of the court, as the case may arise, is clear, and not to be avoided. But upon all the considerations stated, I do not hesitate to express my judgment that the law in question is constitutional and valid.

The act of 1874 provides that, upon motion, the court may, in its discretion, require books and papers to be produced; and it is insisted that this discretion should be exercised in favor of the claimants and the motions be denied. But, as I hold the law to be valid, and as no objection addressed to the discretion of the court has been urged, except that involved in the claim that the law is invalid, I do not think it would be a just and suitable exercise of discretion to refuse the orders applied for. A case is made, on the papers, for the granting of the orders. No special circumstances are shown for a refusal of the orders. The claimants stand on what they maintain are constitutional rights. Deciding as I do, that these rights are not infringed upon, on the cases presented, I must permit the orders requiring the production of the specified books and papers, to stand.

Nor do I think I should dismiss these proceedings or vacate the orders made, on the objection that the motion papers do not describe with sufficient particularity the books and papers required. They are specified in the motion as the day-books, blotters, journals, ledgers, cash books, letter books, shipping-bill books, and receipts for spirits and liquors shipped, and invoices of spirits and liquors bought or received, used and kept by the parties in their business as distillers or rectifiers, between certain dates named in the writ-

In re Daniels.

ten motion. This is a sufficient designation of the books and papers to meet the requirement of the statute. The books and papers are specified, the business in which they were made, kept and used, is named and dates are given.

The motion to vacate the order heretofore granted in Aaron Schoenfield's case is denied. All the orders for the production of books and papers in these cases will stand. The books and papers should be produced for examination by the government attorneys, the owners having the right to be present with their counsel during such examination.

In re JOHN H. DANIELS.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY,
1875.

IN BANKRUPTCY.

1. LOSS ON STOCK SOLD WITHOUT LEAVE OF COURT.—Brokers carrying stocks on a margin, which at the time of the commencement of bankruptcy proceedings could have been sold out at a profit, but who carry it until a decline, and finally close it out at a loss, all without application to the court, cannot prove their claim for differences against the estate.

2. A broker who holds stocks on a margin is bound to take notice of the buyer's bankruptcy.

3. If a broker, who holds stocks on a margin, continues to hold them for an unreasonable length of time after the buyer's bankruptcy, and then sells them without notice, he must sustain the loss.

Hutchinson & Luff, for creditors.

John Van Arman, for assignee.

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This was an application on the part of the assignee of said bankrupt to expunge a claim filed for between fourteen and fifteen thousand dollars, by the firm of F. B. Wallace & Co., of New York City.

BLODGETT, J.—It appears from the evidence in the case, that Daniels was for some years prior to his being declared bankrupt, a banker at Wilmington, in Will county, in this district; that F. B. Wallace & Co., the claimants, were engaged in the business of stock brokers in the city of New York; that Daniels filed his voluntary petition in bankruptcy on the 3d day of July, 1873, upon which he was immediately adjudged bankrupt; that for two or three years prior to his bankruptcy, Daniels had been operating to a greater or less extent in stocks upon the New York market, through the firm of F. B. Wallace & Co., who purchased stocks upon the orders of Daniels, paying the money therefor and receiving and holding the stocks together with a margin of ten per cent., or less, as security for the money advanced by them.

At the time Daniels was declared bankrupt, Wallace & Co. held seven hundred and fifty shares of the stock of the Chicago & Alton Railroad Company, which had been purchased pursuant to the arrangement I have mentioned, upon which, however, the margin was nearly exhausted, but the stock at that time could have been sold so as to have left some balance to the credit of Daniels in the hands of the brokers. After Daniels' adjudication, and until about the 18th of September, 1873, said stock remained at about the same price. After the 18th of September—being about the time that Jay Cooke & Co. failed—said stock declined rapidly in value, and on the 24th of October, Wallace & Co. sold the same, and passed the proceeds to the credit of Daniels, leaving Daniels, by their account rendered, in debt to said brokers in the sum of thirteen thousand four hundred dollars. This amount, together with the interest accrued thereon, said Wallace & Co. have brought as a claim against the estate of Daniels, and the assignee seeks to have the same expunged on the ground that

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it is not a valid claim to be paid out of the assets of said estate.

It will be noticed from the recital of facts, that at the time Daniels became bankrupt, the adventure in these stocks could have been closed so as to have left something to the credit of the bankrupt; in other words, the bankrupt did not owe his brokers anything at that time. True, it is claimed on the part of the brokers that this transaction was in all respects that of a loan from Wallace to Daniels of the amount of money necessary to buy the stocks in question, and that they simply held the stocks as security for their loan, but it is equally apparent from the evidence and from the nature of the transaction as developed by the proof, that Daniels was engaged merely in speculating upon the fluctuations in the value of this stock. He never intended to become the owner of this stock upon the books of the corporation by whom it was issued, but simply bought the stocks upon a margin which he had put up with his brokers for the purpose of making a profit, if any should accrue, in an advance on the price of said stocks. The real owners of said stocks were the brokers who had advanced the money to buy the same and held the stocks in their own name for their own security, together with whatever margin Daniels might have from time to time remaining in their hands.

It does not appear that any application was made by Wallace & Co. to this court for leave to sell these stocks, nor did the assignee of the bankrupt, who was elected on the 18th of August, receive any notice from Wallace & Co. of any such intention, but the brokers held such stocks probably as long as under the circumstances they thought it profitable or safe to themselves to hold them, and then, without notice, sold them upon the market for whatever price they would bring.

The bankrupt in his schedule refers to these stocks as held on a margin, and in which he had no interest except for a disputed difference between himself and his brokers in regard to the interest which had been charged him. As I said be-

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fore, there was no indebtedness between the broker and the bankrupt at the time Daniels became bankrupt.

It was undoubtedly the duty of Wallace & Co., under the circumstances, to take notice of Daniels' adjudication in bankruptcy. They were bound to know that their correspondent had lost the ability to control this venture from the time of his adjudication, and that the management of the affair was thereafter in the hands of this court; and as it is no part of the duty of an assignee in bankruptcy to speculate in stocks, there can be no doubt but what this court, on information being imparted to it of the condition of the bankrupt's estate with reference to these dealings with Wallace & Co., would have at once ordered said stocks sold and the adventure terminated; but without disclosing the relations which they bore to the court, Wallace & Co. continue to hold these stocks upon a declining market, through a critical financial period, and finally sell them out without leave of court, and seek now to make the bankrupt's estate responsible for this large difference.

I do not think the claim, as it is presented under the evidence, should be allowed. It has all accrued since Daniels was adjudged bankrupt, and under such circumstances that I cannot conceive that the creditors or assignee of Daniels are morally or legally bound to sustain this loss.

The claim is therefore expunged.

Generally as to the rights of creditors holding securities or collaterals, consult Bump on Bankruptcy, § 5075 and notes under said section.—[Reporter.]

McCord vs. Steamboat Tiber.

DAVID McCORD vs. THE STEAMBOAT TIBER.

DISTRICT COURT.—WESTERN DISTRICT OF WISCONSIN.—JULY,
1875.

PERSONAL INJURIES—NEGLIGENCE—DAMAGES—THE RULE AT COMMON LAW
AND IN ADMIRALTY.

1. **OBSTRUCTING NAVIGATION.**—A vessel has no right to obstruct the channel by stretching a line across it, and if she does, is liable for damages sustained thereby by passing raft or vessel. A raft is under no obligation to look out for such an obstruction.

2. **CONTRIBUTORY NEGLIGENCE.**—The common law doctrines of contributory negligence do not apply to admiralty law.

3. **ELECTION OF REMEDY.**—The sufferer has his election to sue at common law or in admiralty, and in either case the law of the forum must prevail.

4. **DAMAGES FOR PERSONAL INJURIES**—for permanent spinal injuries to a pilot, disabling him from following his profession, fixed at \$2,500.

G. C. Hazelton and O. B. Thomas, for libellant.

Wm. Hull and Cameron & Losey, for respondent.

HOPKINS, J.—The libel charges that on the 4th of August, 1873, the libellant was a pilot in charge of a raft of lumber floating down and navigating the Mississippi river, in this state, and that the respondent, a steamboat duly licensed and navigated as a tow-boat, was aground at a point west of the main channel of the river, opposite Grant county, at a distance of about six hundred feet from the Wisconsin shore; and that while she was so aground she stretched a line from the boat to a tree on the Wisconsin shore and across the main channel of the river, the part which the libellant was then and there navigating with his raft; and

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that the line was left and permitted to remain so near the water as to not allow the raft to pass safely under it, and that as the raft approached it, floating with the current, the line caught upon a pin on the raft, and by means thereof, it was drawn so tight that it broke the pin and swept across the raft with great force, striking the libellant who was standing thereon, on the back, and throwing him down with great violence upon the raft, by means of which he was bruised and injured in his legs, back, hips and neck, from the effects of which he suffered great pain, and was unable, and still is unable, to pursue the business of a pilot, and is permanently disabled from doing hard manual labor as he was before accustomed to do.

The evidence substantially sustains these allegations. The respondent had no right to obstruct the channel with a line across it in that manner, and the doing of such an act renders her liable for the damages sustained thereby by a passing vessel or raft. If it was for the safety of the boat to make a line fast to the shore, or to use a line attached to the shore as a necessary assistance in getting off the bar, she should have taken care to get it out of the way of all passing vessels, either by dropping it, so that they could pass over it safely, or by casting off one end. The obstruction not being removed so as to let this raft pass over or under it in safety, was manifestly illegal, and renders her liable for all injury to the raft or the persons on board of her, unless the respondent's claim of negligence on the part of the pilot of the raft (the libellant) is sustained.

The respondent's counsel claimed that if the libellant was guilty of negligence, which directly contributed to the accident, he cannot recover, even if the court should find that the injury was mainly attributable to negligence of the respondents. This is the common law rule, but it is not the rule of the civil or admiralty law, according to which this case is to be determined. The question has recently been authorita-

tively settled by the Supreme Court in *Atlee vs. Packet Company*, 21 Wallace, 389.

The libellant had his election to sue the party obstructing the stream, either at law or to proceed in admiralty; and having adopted the latter, the case must be tried and determined according to rules of law prevailing in courts of admiralty, and neither party can invoke the rules and decisions of the common law courts in its determination. The law of the forum must prevail.

At common law any negligence of the plaintiff contributing to the accident or injury defeats a recovery; but not so in admiralty. There, when both parties are at fault, the court apportions the damages between them according to justice and equity, having due regard to the degree of negligence imputable to each; so that in admiralty, a party in fault may recover of another party, whose negligence contributed to cause the injury, a portion of the damages, while at common law a defendant must pay all damages or none.

But in admiralty there is no apportionment; except in cases of mutual neglect or fault, so that it is as necessary to inquire and ascertain the conduct of both parties in reference to the alleged injury in admiralty as at law, not for the purpose of defeating any recovery, but in order to see whether the damages should be divided, and if so, to properly divide them, having reference to the degree of fault by each in the particular occurrence.

In this case the respondent insisted that the libellant should have kept near the Wisconsin shore, where there was good water, and where the line was high enough to have allowed the raft to pass under in safety, instead of having kept in the main current, and where the swag of the line brought it the nearest to the water.

If by the exercise of ordinary care and foresight he might have done so, this position of the respondent is well taken, but I do not think the evidence supports it. It is true the witnesses on the boat say the line was a white one, and could have been seen for half a mile if the crew on

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the raft had looked for it. As they had no reason to expect such an obstruction across the navigable part of the river, they had no reason to look sharp for it. There was nothing to put them on special watch therefor. The crew on the raft say they did not see it until within one hundred and fifty or two hundred yards of it, and that it was then too late to change the course of the raft so as to avoid going under where they did; that as soon as they saw it they commenced taking down the shanty on the raft, so that they could go under safely, and that they thought by so doing they could do so; but that the line was either lowered just as they reached it, or was lower than they previously supposed, so that it would not clear the raft and pins upon it; that when the line caught upon the pin and was becoming very tight the pilot or some one on the raft was about to cut it, when he was threatened by the captain of the boat with being shot if he did so, and desisted. The captain told them not to cut it and he would pay all damages. That at about that time the pin broke and the line past over the raft with great force, knocking the libellant down and bruising his knees, shins, ankles and back, and hip, so that he was unable longer to perform his duty as pilot, and was shipped to his home in Boscobel.

The weight of the testimony exculpates the libellant from all contributory fault, and shows that the injury was caused by the negligence and carelessness of the crew in charge of the steamboat, and consequently she must bear the damages occasioned thereby.

I feel very firmly convinced that my conclusions on this branch of the case are well sustained. Indeed, the captain of the steamer settled with the owner of the lumber at the time, for his loss and for the injury to another of the hands without questioning his liability, and the evidence is very clear to my mind that he then justly appreciated the situation and his obligations springing therefrom.

The boat being liable for the injury, the question as to the amount of damages or compensation is by far the most diffi-

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cult one to determine. The testimony on this point is quite meagre. The respondent offered none on that branch of the case. The libellant stated particularly his injuries and their effect upon him, and called physicians to support his theory that the injury will be permanent; that his spine is affected, and that the muscles about one hip are shrinking away. There being no evidence in contradiction of this theory, I must assume it to be true, although from the general appearance of the man, I should not have supposed his injuries were so serious or of so endurable a character.

The case shows that the plaintiff is a laboring man, forty-seven years old, with a family of five children, and he swears, and his physicians corroborate him, so far as medical testimony can be said to corroborate such facts, that he has been unable, since that injury, to follow his business of raft pilot on the river, on account of his inability to use an oar.

This being the case, the damages sustained by him are serious. Dr. Ward states, he thinks that his disability is equal to about three-fourths—in other words, as I understand him, he is now able to do only one-quarter of the work he was able to do before the injury. The doctor also stated that he thought the disability permanent to that extent.

In view of this testimony, I think the libellant should recover of the respondent and her sureties the sum of \$2,500 for the injuries and damages sustained by him by the accident aforesaid, and order judgment against the respondent and her sureties for that sum, and costs to be taxed.

The Christopher North.

THE CHRISTOPHER NORTH.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY,
1875.

IN ADMIRALTY.

LIBEL FOR REPAIRS.—Where a vessel goes from her home port to another state for the express purpose of being repaired, and the owners have no personal credit, a libel will lie against her at her home port for the balance due for such repairs.

Tenneys, Flower & Abercombis, for libellant.

Magee, Oleson, & Adkinson, for respondents.

BLODGETT, J.—This is a libel for repairs made by the Manitowoc Dry Dock Company, upon the schooner Christopher North, in the month of September, 1872. The facts of the case appear to be these: The Christopher North was owned in the city of Chicago, by Jacob Hansen and one Scharvey. She was in need of repairs, and for the purpose of having her repaired in the best and most economical manner, one of her owners, Hansen, went to Manitowoc and made a contract there with the Manitowoc Dry Dock Company, a corporation doing business at Manitowoc, Wis., in the repair and building of vessels. This company were to do certain repairs to the vessel, for which they were to receive a fixed price, half the money down, and the remainder in sixty days. After making the contract, Hansen telegraphed to Scharvey, who was captain and part owner of the vessel, to make sail with her for Manitowoc for the purpose of having her repaired there. The schooner accordingly proceeded to Manitowoc,

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and underwent the repairs which had been ordered. When they were completed and the vessel ready to leave the dock, a draft was made for one-half of the expense, the captain giving a certificate of indebtedness for the remaining half, and certifying that it was for repairs done to the schooner, payable in sixty days. On account of this indebtedness the libel was filed against the schooner.

The defense is now interposed that this work was done upon the credit of the owners, and not upon the credit of the vessel, although it was done in a foreign port, Chicago being the port of the Christopher North. She, however, did not leave this port upon a commercial voyage in the ordinary course of maritime employment, but for the express purpose of receiving these repairs, and the question is whether upon the facts of the case the relations of the parties are not precisely the same as though these repairs had been made while the vessel was in the home port; whether for the purpose of these repairs Manitowoc may not be said to have been the home port of this vessel, and whether it was not upon personal credit rather than upon the credit of the vessel that the repairs were made. The evidence shows that the owners of the vessel were not men in financial credit. One of them was a shoemaker residing in this city, and the other was master of the vessel, and having no means outside of his interest in the vessel to give him credit. Neither of the owners had any property or credit at Manitowoc aside from this vessel. There is no doubt but that if this vessel had put into the port of Manitowoc to undergo repairs, that these repairs would have been a lien on the vessel upon the facts shown, and, although the owner took the precaution to go to Manitowoc and make a contract before taking the vessel there, yet that, it seems to me, does not divest the parties making the repairs of their maritime lien. Under the circumstances of the case it seems to me that the court must find, as a matter of fact, that the repairs were made on the credit of the vessel.

The decree will be for the amount due on the certificate of indebtedness.

Long, Assignee, vs. Rogers.

**JAMES LONG, ASSIGNEE OF THE EQUITABLE INSURANCE
COMPANY vs. WILLIAM H. ROGERS *et al.***

**DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY,
1875.**

IN EQUITY.

1. SALE AT OLD COURT HOUSE DOOR AFTER CHICAGO FIRE.—Where a trustee's sale was made after the Chicago fire of October 9, 1871, at the north door of the (old) court house, the place specified in the trust deed, a subsequent purchaser is not bound to look beyond the recitals in the regular trustee's deed.

2. BANKRUPTCY OF SUBSEQUENT MORTGAGEE, is no objection to the execution of the power of sale in the prior incumbrance.

This was a bill to set aside a sale on a trust deed given by William H. Rogers to William H. King, to secure a certain indebtedness in the trust deed described. The facts in the case were undisputed. The trust deed was given by Rogers to King to secure an indebtedness, and subsequently the party borrowed of the Equitable Insurance Company \$4,000, for which he gave a second trust deed to one Montgomery, upon the same security, the Equitable Insurance Company being the beneficiary in the second trust deed. By the fire of October 9, 1871, the Equitable Insurance Company was rendered insolvent, and on the 29th of September, 1871, a petition in bankruptcy was filed against it. At the time this petition was filed it held the \$4,000 note. On the 29th of January, 1872, it was adjudicated bankrupt, and on the 27th of March, 1872, James Long was elected its assignee.

Some time prior to this, default having been made in the payment of the interest on one of the notes, and the first trust deed becoming due, the trustee in the first incumbrance

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elected to foreclose, and advertised the property for sale under the provisions and powers contained in the trust deed. However, before the time for sale, according to the advertisement, (and the sale was to take place at the north door of the courthouse, in the city of Chicago) the fire came, and the courthouse was destroyed, so that nothing remained of it and of the north door of the same, except the ruins. The sale was afterwards made at the spot where that north door had stood, on the 2d of April, 1872, under a new advertisement, the courts having meanwhile moved to a new building on the corner of Adame and La Salle streets. Charles M. Smith became the purchaser of the property at this sale, for the amount of the trust deed and costs. The trustee then indorsed the notes as paid by the sale of the property in question, and delivered them over to Rogers, the grantor in the trust deed. Soon after the sale, Mr. King, as trustee, executed and delivered to Smith a trustee's deed, conveying all the right and interest originally conveyed to him under the trust deed. Within a short time after this conveyance to him, Smith borrowed of Trinity College the sum of \$8,000, securing the same by a trust deed on this property, and subsequently the equity of redemption was conveyed to the other defendant, McIntosh, subject to this incumbrance. The bill in this case seeks to set aside the entire title conveyed by the sale: *first*, for the reason that the sale was void, for fraud and collusion between the parties; *secondly*, because it was not made in accordance with the terms of the trust deed; and, *thirdly*, because the Equitable Insurance Company, which held a mortgage on Rogers' equity of redemption in the property so sold, was in bankruptcy at the time the sale took place, and therefore it is sought to be void as against them, and those claiming under them.

Hoyne, Horton & Hoyne, for Long.

Herbert & Quick, for Rogers.

BLODGETT, J.—It is not disputed that Long, the assignee,

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did hold all the rights which the Equitable Insurance Company held by virtue of the Montgomery trust deed, which was the second one given. In regard to the first point, namely, that of fraudulent combination between Rogers, the mortgagor, and Smith the purchaser, and Fisher, the holder of the note, I do not think the evidence sufficient to sustain the allegation or entitle the party to relief on that ground.

In regard to the second point, namely, that the sale was irregular because it was made at the ruins of the door of the old court-house, I am inclined to think that would be a good point if made at the time the sale took place. It would be good ground for stopping the sale before rights intervene, but I doubt if a purchaser would be absolutely obliged to take notice that the court-house was a ruin. Here is a trust deed with power to sell, and under its provisions a sale does take place, and a deed is given, in which it is recited that the sale was in due form and according to the terms of the deed. Under that, the person buying is clothed with a title, and thereupon he sells the property to another. Now, is it for a moment to be supposed that the other is obliged to look back to all the external facts connected with the sale, when his deed seems perfectly valid, and is in the regular form? I am inclined to think not, and I also think that the sale was made in pursuance of the terms of the trust deed.

I now come to the third point, namely, that the sale was void because the Equitable Insurance Company was in bankruptcy at the time. Now, the position of the company was simply that of mortgagee of Rogers' equity of redemption. That they held that, is clear, but it is clear also that he had the right to redeem from both the King and Montgomery incumbrance in which the insurance company was interested. Now, it has been held in several instances that when a bankrupt was the owner of the equity of redemption, and foreclosure proceedings were instituted after the bankruptcy, or an attempt was made to foreclose by a sale under a power in a trust deed, that the proceedings were void unless made with

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leave of the bankrupt court.¹ In this case, however, the company did not hold the equity of redemption vested in Rogers. The only interest the company held was as second mortgagee. King, by the power delegated to him under the first trust deed, was authorized to sell upon certain contingencies. These contingencies which so authorized him to sell had actually arisen and happened, and accordingly he proceeded to, and did, make the sale. The grantor to him was not in bankruptcy: he was capable of acting. Rogers was capable of paying off the debt,—at least nothing has been proved to the contrary; and, consequently, he was capable of acting. Now the ground upon which the courts have gone in the question above referred to is, that the grantor could not pay off the debt without leave of the court, and that therefore the proceedings were void, because of the invalidity of the bankrupt to act. But here, in this case, King was not bound to take notice of the fact that the insurance company was the holder. I am inclined to think that, under the circumstances, he was not bound to suppose that he rested under any disability, and there was no privity of contract between him or Fisher and the bankrupt. They stood in no relation to the bankrupt, and had no right to take notice of the insurance company's position, and, inasmuch as there was no such privity between the parties, I do not think the sale was void. Besides, Trinity College and McIntosh had advanced large sums of money on the faith of their titles and the validity of the sale, and it seems to me that it would be going a great ways to set aside this sale to the detriment of innocent holders.

The bill will therefore be dismissed.

The powers contained in a trust deed must be strictly construed, but under a power contained in a trust deed to sell at the north door of the court house in Chicago, it could be rightfully executed at the ruins of the north door of the court house, it having been destroyed in the interim by fire. *Walle vs. Arnold*, 7 Chicago Legal News, 28; see *Gregory vs. Clark*, Id. 388.

¹ *Jasper Hutchings et al, Assignees, etc., vs. Muzzy Iron Works*, 6 Chicago Legal News, 26; *In re Bruckman*, 7 Bankruptcy Register, 421.

Lamb, Assignee, vs. Lamb.

WILMER S. LAMB, ASSIGNEE, ETC., vs. MICHAEL LAMB.

DISTRICT COURT.—DISTRICT OF INDIANA.—AUGUST, 1875.

PREMIUM NOTE—FOREIGN CORPORATION.

1. **CORPORATIONS—PREMIUM NOTE—FOREIGN CORPORATIONS.**—It is a good defense to a premium note to a mutual insurance company of another state, that the note was given in Indiana to an agent of the company, the company not having complied with the Indiana statute respecting foreign corporations. Mutual insurance companies are clearly within the statute.

2. **CONDITIONS IMPOSED ON FOREIGN CORPORATIONS.**—A state allowing a foreign corporation to do business within its limits, may impose such reasonable conditions as it sees fit. *Payson vs. Withers*, distinguished.

3. **ASSESSMENT BY COURT DOES NOT ESTABLISH VALIDITY OF NOTE.**—The order of assessment by the bankruptcy court does not bind the maker as to the validity of the note—his defense to the note can be heard when action is brought upon it.

This was an action brought by Wilmer S. Lamb, assignee of the Winnishiek Insurance Company, against Michael Lamb. It is averred in the declaration that on the 5th day of November, 1863, the defendant executed to said company his premium note, to be paid at such time and in such sums as the board of directors might require, to pay losses and expenses of said company; that on the 21st of September, 1871, the said company was duly adjudged a bankrupt by the district court of the United States for the Northern District of Illinois; that the plaintiff was appointed assignee of the effects of said company; that on the 22d of April, 1873, the said district court of the United States for the Northern District of Illinois made an assessment upon all the premium notes belonging to said company, to the full amount of said

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premium notes; and that said defendant had failed and refused to pay said assessment on his said note.

The fourth plea of said defendant avers that the premium note described in the declaration was taken by one Myron G. Wheeler, on behalf of said company, as agent thereof, in the county of Vigo, and state of Indiana, in consideration of a certain policy of insurance issued to the defendant by said Wheeler as such agent; that said company was created under and by virtue of the laws of Illinois; and that said contract of insurance was entered into, and said note given, at the said county of Vigo, and state of Indiana, without said company or agent having in any wise complied with the provisions of an act of the General Assembly of Indiana,¹ respecting foreign corporations.

To this plea defendant filed a general demurrer.

McDonald & Butler, for plaintiff.

Baird & Cruft, Voorhees & Carleton, and Harrison, Hines & Miller, for defendant.

GREESHAM, J.—The first section of the act referred to in the plea declares that agents of foreign corporations, before entering upon the duties of their agency in this state, shall deposit in the clerk's office of the county where they propose doing business the commission or other authority by virtue of which they act as agents.

The second section declares that before doing any business in this state said agents shall procure and file with the clerk of the circuit court of the county where they propose doing business a duly authenticated order or resolution of the board of directors of such corporation authorizing citizens of this state having demands arising out of any transaction in this state with such agents, to sue for and maintain an action

¹ 1 Gavin & Hord, Statutes of Indiana, 272.

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for the same in any court of competent jurisdiction in this state, and for that purpose authorizing service of process on such agent to be valid service on such corporation.

The third section declares that service of process on such agents shall be deemed service on the corporation.

The fourth section declares that foreign corporations shall not enforce in any courts of this state any contracts made by their agents before compliance with the provisions of sections one and two of the act.

The fifth section declares that any person who shall directly or indirectly recover or transmit money or anything of value to or for the use of such corporation, or who shall in any manner make or cause to be made any contract, or transact any business for such foreign corporation, shall be deemed an agent of such corporation.

The sixth section declares that section five "shall not apply to persons acting as agents for foreign corporations for a special or temporary purpose, or for purposes not within the ordinary business of such corporation."

The seventh section declares that any person so acting as agent of any foreign corporation, without first complying with the provisions of this act, shall be fined in any sum not less than fifty dollars.

The language of this statute is clear and free from ambiguity. In such cases there is no room for construction. All corporations created in other states are included.¹

The evident object of the act was to protect the people of this state against irresponsible foreign corporations and their agents, and to provide those having demands against such corporations, growing out of the usual and ordinary business transacted by them or their agents in this state, a cheap and speedy remedy in their home courts, without being driven to a foreign and distant jurisdiction.

Experience seems to have demonstrated the necessity for

¹ *Rising Sun Insurance Company vs. Slaughter*, 20 Indiana, 530.

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legislation of this character in most of the states. The power of the states to enact such laws is no longer seriously questioned.

Corporations are mere creatures of local laws, and must therefore dwell in the place of their creation. In the absence of such laws as the statute under consideration they may enter the territory of other states and make contracts within the scope of their limited powers, for there is then an implied assent to their thus migrating. Having no absolute right to recognition in other states without their assent, it follows that such assent may be granted on such reasonable conditions as the state assenting may in its discretion see fit to impose.¹

But it is argued that the taking of the defendant's premium note and issuing to him his policy were acts within the exception of the sixth section of the act; that in taking the note and issuing the policy, Wheeler was an agent "for a special or temporary purpose," and for a "purpose not within the ordinary business of such corporation."

In support of this position I am referred to the case of *Payson, Assignee, etc., vs. Withers*, decided at the May term, 1873, of the Circuit Court of the United States for this district.²

The cases are clearly distinguishable. That of *Payson vs. Withers* was brought to recover on a subscription made in this state for stock of an insurance company of another state. This is an action on a premium note made in Indiana, the consideration for which is a policy issued by a mutual company of another state.

In the former case, the learned circuit judge said that the subscription to the capital stock "was not the ordinary busi-

¹ *Hoffman vs. Banks*, 41 Indiana, 1; *Farmers & Merchants Insurance Company vs. Harrah*, 47 do., 236; *Rising Sun Insurance Company vs. Slaughter*, *supra*; *Washington Co. Mutual Insurance Company vs. Hastings*, 2 Allen, 398; *Williams vs. Cheney*, 8 Gray, 206; *Paul vs. Virginia*, 8 Wallace, 168.

² Vol. 5 of this Series, 269.

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ness of the corporation; that it was an act preliminary to the commencement of its business; that when the stock subscriptions were made, and the corporation was set in motion and made to perform its functions, then the ordinary business referred to by the act began—the issuing of policies of insurance and performing the general and other business connected with such corporations.”

But mutual insurance companies have little other business than the issuing of policies, taking premium notes, receiving cash premiums and adjusting and paying losses. Certainly, the issuing of policies and taking premium notes is not only their “ordinary business,” but their principal business.

If the position of the defendant be correct, it follows that mutual insurance companies are not embraced in the act at all. Such a construction would violate the plain letter of the statute. No good reason can be assigned for any such legislative exemption which would not apply with equal force to stock insurance companies. It can hardly be said that experience has shown the superior solvency or value in any other respect of insurance companies organized on the mutual system; and a comparison would perhaps prove the difference to be in favor of the stock companies. Certainly whatever protection the legislature designed to afford the citizen was in sound reason as much demanded against the one class of insurance companies as against the other.

It is further insisted that the defendant is precluded from making this defense by the judgment of the court which made the assessment on the premium notes. The order of the court has the same force as an assessment made by the company, with this exception, that the makers of the premium notes will not be allowed to dispute the correctness of the amount of the assessment as made by the court. The order of assessment was made without personal service and the notice given to policy-holders by publication was general without naming them. It will readily appear that in making such orders it is not possible for courts to hear and decide upon all the vari-

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ous defenses which a numerous body of policy-holders might be justly entitled to present, as, for example, *non est factum*, surrender and acceptance of the policy, that the note was obtained by fraud, or was made in violation of law, as in this instance. These defenses can and ought to be heard when actions are brought for the recovery of the premium notes.

I am clearly of the opinion that the act of the legislature was directed against foreign mutual insurance companies as well as against foreign stock insurance companies; and that the premium note declared on was taken in violation of law, and is therefore void.

The demurrer will be overruled.

ANDREW WARREN, JR., vs. WISCONSIN VALLEY
RAILROAD CO.

CIRCUIT COURT.—WESTERN DISTRICT OF WISCONSIN.—AUGUST,
1875.

REMOVAL OF CAUSE FROM STATE COURT.

CONDEMNATION PROCEEDINGS—JURISDICTION.—A proceeding under the right of eminent domain to condemn land for a railroad is not a case in which the state is a party; and the federal courts may have jurisdiction. Nor is it a special proceeding, nor can the right of removal be limited by state laws. It is in effect a suit of civil nature, and if the parties are competent, comes under the United States statutes for removal of causes.

Wm. F. Vilas, for plaintiff.

W. C. Silverthorn and P. L. Spooner, for defendant.

HOPKINS, J.—The railway company above named required

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certain portions of the plaintiff's land for the purpose of its road, and not agreeing with him upon the damages to be paid therefor, had them appraised by commissioners, according to the provisions of the railroad law of this state.¹ The company had separate awards for each tract or government description through which it ran, being six in number. The plaintiff not being satisfied with the amount awarded by the commissioners, appealed to the circuit court of Marathon county from each award, in accordance with the provisions of the act aforesaid.

After the appeals, the plaintiff, being a citizen of the state of Illinois, filed his petition in the state circuit court, stating that he was a citizen of the state of Illinois, and that the railroad company was a citizen of this state, also that the amount in dispute exceeded the sum of \$500 in each case, and prayed for the removal of the cases for trial into this court. The state court granted the order and accepted the bond, and copies of the records in each case were filed and the cases duly docketed in this court.

The plaintiff now moves to consolidate said cases, which motion is opposed by defendants on the ground that this court has not jurisdiction, but conceding that if the court has, they should be consolidated. The defendant, in order to present the question directly before the court, moved to remand the cases to the state circuit court, for the reason that this court had not jurisdiction thereof.

Section seventeen of the state statute aforesaid provides for an appeal by either party, and declares that upon filing a written notice of appeal in the office of the clerk of the circuit court of the county in which the land is situated, and where the award of the commissioners is required to be filed and recorded, "the appeal shall be considered an action pending in court subject to a change of the place of trial and ap-

¹ Chapter 119, General Laws of 1872.

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peal to the Supreme Court as other actions, and shall be entered by the clerk upon the records of the court by setting down the owners of the land for which such award was made, and who are parties to the appeal as plaintiffs, and the railroad company as defendants." It further declares that the appeal shall be tried by a jury unless waived, and that costs shall be awarded to the successful party on such appeal, and that judgments shall be rendered therein, according to the rights of the parties.

The award is to be recorded in the judgment book by the clerk in whose office it is filed. If the award is not paid in sixty days from the filing, or in case of appeal, if the judgment upon the appeal is not paid within sixty days, the plaintiff or party interested may have execution thereon. Section nineteen provides that upon the railroad company's paying into court the amount of the award or judgment, or filing in the clerk's office of the court a receipt therefor, duly signed and acknowledged by the owner, the clerk shall make a minute of such payment or filing of such receipt at the foot of the record of the report of the commissioners, in the judgment book of said court, and that thereupon the exclusive use of such premises shall vest in the railroad company without any further act, deed or conveyance, and further declares that such record or a certified copy thereof shall be *prima facie* evidence of such title in all courts and places.

The motion to remand was based upon two grounds: First, that as it was a proceeding by the state in the exercise of its right of eminent domain, the case was to be regarded as substantially against the state, and that this court had no jurisdiction in a suit against a state. This position is correct, if the state is a party. But I do not see how that can be maintained. The state statute above quoted declares that the railroad company shall be defendant, and that when it pays the amount of damages or compensation awarded by commissioners, or by the court on appeal, the title or use of the land shall vest exclusively in the railroad company. The state has

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no interest in the controversy. It is not a controversy where the state is a party nominally or beneficially. The statute conferred upon the railroad company the right to take what lands it required, but made it liable for all damages and compensation: and this controversy relates, not to the right of the railroad company or the state to take the lands described, but only to the amount of compensation the railroad company must pay as a condition of the taking. It seems very clear to my mind that this is not a suit prosecuted against a state, within the meaning of the Constitution, and that, therefore, the first ground of objection is not well taken.

The second ground relied upon was, that it was not a suit in such a sense as to be removable; that it was a special proceeding, provided for ascertaining the damages and passing title to the land taken or condemned, especially applicable to proceedings in the state courts, and not adapted to the practice and modes of procedure in this court; and that the rights of the railroad company could not be obtained in the manner provided by the state statute in this court. If this objection states truly the essential nature of the case, it might be regarded as an answer to the jurisdiction of this court. But does it? It was suggested that the state could have provided for an assessment of damages by a sheriff's jury, and not given to the proceedings any attribute of a suit. Without determining that question either one way or the other, the point to be passed upon here is, Has the state stripped the proceedings of all the characteristics of an action? I think it has not. It is true, the mode of getting the case into the courts is different, but after having provided a way of getting the matter into court, it is then treated as an action. The act says, "the appeal shall be considered as an action pending in court," and from that time it is proceeded with in the same manner as other actions up to and including judgment and execution. The owner of the land is the plaintiff, and the railroad company defendant. So it seems to me the state has invested the proceedings with the dignity and attributes of an action, and

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the parties are not, therefore, at liberty to say it is not an action. The state has given the parties the plenary advantages of an ordinary suit at law, and the courts have but to see that they enjoy them.

But, even if the proceedings in the state courts are different from the usual modes of prosecuting suits for the enforcement of private rights, still it is in effect a suit of a civil nature, in which the controversy is between citizens of different states. The plaintiff is seeking to obtain compensation of the defendants for the land they have taken from him. It involves the question of the value of the land taken by defendants, and the damages of the plaintiff sustained thereby. It is not a new right of action given by the state. The common law gave a remedy by action in such a case, and the state legislature, by changing the mode of proceedings to ascertain the damages of a party whose lands have been taken, cannot change the essential character of the cause of action or right of action. It is still in effect a suit of a civil nature where a judgment may be rendered which concludes the parties as in other suits. The status of the parties is, I think, the same as in any suit of a civil nature at common law.

It was the intention of Congress, under the power conferred by the Constitution, to give to suitors having a right to sue in the federal courts remedies co-extensive with such rights. These remedies cannot be abridged or controlled by state legislation, by exempting a person or corporation of such state from suit. A citizen of another state, in this respect, possesses a right not pertaining to one of the same state. *Suydam vs. Broadnax*, 14 Peters, 67; *Railway Company vs. Whitton's Administrator*, 13 Wallace, 270. In this last case it was held that where the state statute gave a new right of action and limited the prosecution for its recovery to a court established by the state, that the party-plaintiff, being a non-resident, was entitled to a removal of the case from the state to the federal courts for trial. The Supreme Court in that case lays down the doctrine that "when a

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general rule as to property or personal rights or injuries to either is established by state legislation, its enforcement by federal courts in a case between proper parties, is a matter of course, and the jurisdiction of the court in such case is not subject to state limitation."¹

But, as I have before said, this plaintiff had a plain right and remedy for his damages in such a case as this at common law, and the Supreme Court in the *Union Bank of Tennessee vs. Jolly's Administrators*, 18 Howard, 503, declared that a law of a state "limiting the remedies of its citizens in its own courts, cannot be applied to prevent the citizens of other states from suing in the courts of the United States in that state, for the recovery of any property or money there to which they may be legally or equitably entitled."

It may be that the proceedings in this court, in ascertaining and enforcing the parties' rights will be different to some extent, but that does not prevent the removal. The Supreme Court has repeatedly held that the jurisdiction of the federal courts over controversies between citizens of different states cannot be impaired by the laws of the states which prescribe the modes of redress in their courts. In *Hyde vs. Stone*, 20 Howard's Reports, 175, it is said in many cases "the forms of the proceeding in these courts have been assimilated to those of the states, either by legislative enactment or by their own rules. But the courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction." So that if this court could not assimilate its practice so as to give to the defendant all the rights it is entitled to, in the mode prescribed by this state statute, it is no answer to its jurisdiction, for it is the duty of this

¹ On this point see also *U. S. ex rel vs. Supervisors of Lee County*, Vol. 2 of this Series, 77.—[Reporter.]

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court to afford a sufficient and adequate remedy so as to secure to the defendant the right to which it is entitled upon paying the judgment finally rendered in the case, and there is no difficulty whatever in determining the remedy to effect that purpose.¹

The twelfth section of the judiciary act of 1789, gave the right of removal to non-resident defendants. That was not as comprehensive as the constitutional provision on the subject, and Congress has from time to time extended the right, and the act of March 3, 1875, has materially enlarged the right of suitors in respect to removal.² It now embraces citizens of other states, whether plaintiff or defendant, and confers an unqualified right to have a case or suit of a civil nature at law or equity transferred on petition of either party to the federal courts for trial, when the parties are citizens of different states, upon complying with the conditions mentioned in the act, and the Supreme Court decided in *Insurance Co. vs. Dunn*, 19 Wallace, 214; *Insurance Co. vs. Morse*, 20 Wallace, 445, "that no power of action thereafter remained" (after filing petition), "to the state court, and that every question, necessarily including the act of its own jurisdiction, must be decided in the federal court." To the same effect is the case of *Osgood vs. The Chicago, Danville & Vincennes R. R. Co.*, ante p. 330.

Applying the doctrine and principles of those decisions to this case, I must overrule the motion to remand the cases to the state court, and hold that this court has jurisdiction thereof.

Having held that this court has jurisdiction, I grant the order conceded by defendant's counsel to be right, consolidating said cases.

¹ *Payne vs. Hook*, 7 Wallace, 425.

² 18 U. S. Statutes at Large, 470.

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In re JOHN OWENS.

DISTRICT COURT.—DISTRICT OF INDIANA.—AUGUST, 1875.

IN BANKRUPTCY.

1. **EXEMPTIONS.**—A debtor is entitled to the full benefit of the exemptions allowed by the bankrupt act, even though an execution had become a perfected lien upon his property before the filing of the petition.

2. **COSTS.**—In Indiana, a judgment for the costs of the opposite party is not a debt growing out of a contract, express or implied, and as against such costs the statute does not allow exemptions.

Motion to set aside the exemptions allowed by the assignee.

Jesse A. Mitchell and Alexander Reid brought an action of replevin in the Lawrence Circuit Court against John Owens, to recover the possession of certain personal property. The property was delivered to the plaintiffs on their executing the usual bond, and on the 18th day of February, 1874, the cause was tried and the court found that the title to the property was in the plaintiffs, and gave them judgment for one cent damages for its unlawful detention, and \$1,216 for costs. On the 26th day of October, 1874, an execution issued on this judgment, which, at 9 o'clock in the forenoon of the same day, came into the hands of the sheriff, and at 3 o'clock in the afternoon of the same day was levied upon all the property of the defendant. At 7 o'clock in the afternoon of the same day John Owens filed his petition in bankruptcy, upon which he was adjudged a voluntary bankrupt before register Butler. Subsequently, upon a proper showing, the sheriff was enjoined from proceeding to sell the property so levied upon, and the same was restored to the possession of

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the said John Owens, upon his executing the proper bond. Afterwards, part of this property, amounting to \$498, was set apart and exempted to the said John Owens, under the \$500 clause of section fourteen of the bankrupt act, and another part of the same property, of the value of \$300, was also set apart as exempt from sale on execution by the laws of this state. During all this time, and at the date of this decision, the said John Owens was a resident householder of Indiana.

Francis Wilson, for Mitchell and Reid.

Alexander Dowling, for bankrupt.

GRESHAM, J.—Section 413 of the Indiana code enacts that “When an execution against the property of any person is delivered to an officer to be executed, the goods and chattels of such person within the jurisdiction of the officer, shall be bound from the time of delivery.”¹

Section 22 of article one, of the Constitution of Indiana, reads as follows: “The privilege of the debtor to enjoy the necessary comforts of life, shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for the payment of any debt or liability hereafter contracted.”²

To carry this provision of the Constitution into effect, the legislature passed an act, the first section of which reads as follows:

“That an amount of property not exceeding in value three hundred dollars, owned by any resident householder, shall not be liable to sale on execution, or any other final process from a court, for any debt growing out of or founded upon a contract express or implied, after the fourth day of July, 1852.”³

¹ 2 Gavin & Hord's Statutes of Indiana, 232.

² 1 Gavin & Hord's Statutes of Indiana, 32.

³ 2 Gavin & Hord's Statutes of Indiana, 868.

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It is claimed that under the facts in this case the exemptions made by the assignee were unauthorized. The household and kitchen furniture, and other articles and necessities set apart to Owens were not unreasonable, if he was entitled to an exemption under the \$500 clause of the act.

Laws exempting reasonable portions of the debtor's property from execution and sale, properly relate to the remedy, and are therefore liable to no constitutional objection.¹ It would be difficult at this age of the world, to find a civilized community without such regulations. Sometimes more is exempted, sometimes less, according to prevailing ideas of policy and humanity.

Each state may enact such reasonable laws as it sees fit, regulating the remedy on contracts in its own courts. A state may not, however, render the remedy valueless by exemptions having no reference to the nature and amount of the debtor's property, or by burdening it with conditions and restrictions. Such laws would be held to violate that part of section 10, article one, of the Constitution of the United States, which prohibits to the states the power to enact laws impairing the obligation of contracts.² But it has been repeatedly held that there is nothing in the Constitution of the United States which forbids Congress to pass laws impairing the obligation of contracts, although that power is denied to the states. And it is no longer controverted that Congress may, by the enactment of a uniform bankrupt law, discharge debtors entirely from the obligations of their contracts. The Constitution having conferred the power to enact such laws, it is in the discretion of Congress to exempt such portions and kinds of the debtor's property as may be thought necessary to protect him and his family from want and distress. And regulations of this kind may be modified from time to time, as

¹ *Bronson vs. Kinzie*, 1 Howard, 311.

² *Bronson vs. Kinzie*, *supra*; *Green vs. Biddle*, 8 Wheaton, 1.

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experience demonstrates the necessity for change, and these modifications made applicable alike to past and future contracts, and rights already vested, as well as those to vest in the future. It must therefore be held, that when the creditor acquires rights, as by judgment or execution liens, such as are claimed in this instance, he does so knowing that the privilege of the debtor to claim the exemptions allowed by the statute remain unimpaired, in the event of his being adjudged a bankrupt.

As to the other branch of the case, it is clear that the statute of the state allows no exemption against a debt or demand not growing out of contract. Against a judgment for damages, in an action of replevin, it is equally clear that the benefit of the statute cannot be claimed. The question arises then, Do the costs partake of the nature of the judgment as a mere incident? At common law no costs were allowed to either party. The statute allows the prevailing party to recover his own costs, on the theory that he has already paid them. But each party is ultimately liable to the officers and witnesses for such costs as he makes, and if he is not required to pay as he goes, it is on an implied assumpsit that he will pay his own costs if he does not succeed in the action, or if he succeeds and his adversary is not good for them. Thus far it would seem that costs are "a debt growing out of or founded on contract." But I am unable to see on what ground the unsuccessful party can be said to have promised to pay the costs of his adversary. It is sometimes the case that after a return of *nulla bona* on an execution against the unsuccessful party in an action of tort, a fee bill issues against the prevailing party for his own costs. In such a case I can see no good reason why the benefit of the statute might not be claimed against a fee bill thus issued as "final process from a court for a debt growing out of or founded on contract." I have not been able to find a ruling of the Supreme Court of Indiana on this question.

I think Owens is entitled to the \$498 worth of property set

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apart to him as above stated, notwithstanding the lien of the execution had attached before the proceedings in bankruptcy were commenced. He is also entitled to the other items, amounting to \$300, exempted to him under the statute of the state, if there is anything left of his property after paying the costs made by the plaintiffs.

In re ALBERT W. HATJE.

DISTRICT COURT.—EASTERN DISTRICT OF WISCONSIN.—SEPTEMBER, 1875.

IN BANKRUPTCY.

1. ATTACHING CREDITOR MAY CONTEST ADJUDICATION.—An attaching creditor, though not a party to bankruptcy proceedings, may contest adjudication on the ground that the requisite number and amount of creditors have not joined in the petition.

2. COSTS OF ATTACHMENT PROCEEDINGS,—do not constitute a demand against a debtor which can be included in estimating the amount of his provable debts, nor will such costs be paid from the funds of the estate unless such proceedings were auxiliary to contemplated bankruptcy proceedings and beneficial to the estate.

3. EVIDENCE—LETTERS TO THIRD PARTIES.—Letters written by the debtor to third parties, admitting the payment of a claim, are admissible in evidence in a contest between attaching and petitioning creditors, where the former attempt by interposing such claim to defeat adjudication.

4. NON-PROVABLE DEBT.—A claim for money loaned to a debtor to aid him in the commission of an act of bankruptcy cannot be included among his provable debts.

In re Hatje.

Cotzhausen, Sylvester & Scheibor, for petitioning creditors.

Cottrill & Cary, for attaching creditors.

DYER, J.—On the 24th of April, 1875, certain creditors of Albert W. Hatje filed a petition that he might be adjudicated a bankrupt. The principal act of bankruptcy charged, was that the debtor had departed from the state with intent to defraud his creditors. On the 3d of May, 1875, Smith, Chandler & Co., creditors of said Hatje, who had, by virtue of process issuing from the state court, attached a stock of goods left by the debtor, moved to set aside the petition, alleging that this court had not jurisdiction to entertain the bankruptcy proceeding. This motion was supported by an affidavit setting forth that at the time the petition was filed, the debtor was indebted to one H. P. Hatje, in the sum of five hundred and ninety-five dollars for money borrowed; and it appearing that neither H. P. Hatje nor Smith, Chandler & Co. had joined in the petition for adjudication, it was contended that the aggregate amount of the debts held by the petitioning creditors did not equal one-third of the provable debts of the debtor. Objection was made by the petitioning creditors to the right of the attaching creditors to make the motion or to resist adjudication on the ground mentioned, neither Albert W. Hatje nor H. P. Hatje appearing. Notwithstanding some conflict in the authorities on the question, I held that the attaching creditors stood in such relation to the property of the debtor, and had such an interest in the pending proceedings, that they had a right to appear and contest adjudication upon the jurisdictional point named. This ruling I regarded as sustained by *In re Boston, Hartford & Erie Railroad Company*, 6 Nat. Bankruptcy Register, 209; *In re Derby*, 8 Bankruptcy Register, 106, and *Clinton, et al. vs. Mayo*, 12 Bankruptcy Register, 39. The question has since been similarly decided by Judge Brown in *In re Bergeron*, Central Law Journal, Vol. 2, p. 507; S. C., 12 Nat. Bankruptcy Register, 385.

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Having determined that the attaching creditors had a right to be heard upon the issue presented, an order was made directing the debtor to file a list of his creditors; but no list being filed, the case was referred to the register, to take proofs on the question whether the debts represented by the petitioning creditors amounted to one-third of the provable debts of the debtor. At the hearing before the register, the attaching creditors made proof of their own claim, amounting to \$678.32, and interposed the claim in favor of H. P. Hatje, and also the costs of the attachment proceedings commenced by them in the state court, as provable demands against the debtor. Treating the demands in favor of the attaching creditors and of H. P. Hatje as subsisting provable debts, it resulted that the requisite amount of debts was not represented by the petitioning creditors. But the register rejected the claim in favor of H. P. Hatje as paid and no longer subsisting, and, including the costs of the attachment proceedings as provable, found and reported that the aggregate debts held by the petitioning creditors constituted one-third of all the provable debts of the debtor. To this report the attaching creditors filed exceptions.

I. The position taken preliminarily by counsel for petitioning creditors, that there was collusion between the debtor and the attaching creditors, and that the former procured his property to be taken on legal process, with intent to give the latter a preference, is not sustained by the evidence. The proofs are, that within a day or two after the debtor absconded, he wrote a letter to a personal friend who was salesman for Smith, Chandler & Co., informing him of his departure, and requesting him to take the goods and do the best he could with them. Knowledge that Hatje had absconded being communicated to Smith, Chandler & Co., probably by the salesman, they began legal proceedings by attachment. There is no evidence of collusion, or even concerted action between the parties. The attaching creditors, as they had a right to do,

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merely endeavored by the usual legal proceedings to reach the property of an absconding debtor.

II. The register erred, I think, in allowing the costs of the attachment proceeding as a demand against the debtor, in estimating the amount of his provable debts. The costs incurred by the attaching creditors in their legal proceedings, which were not then concluded, did not in my judgment constitute a debt within the meaning of the bankrupt law, which should be considered in ascertaining the amount of debts owing by the debtor when the petition was filed. In the language of some of the cases, they are not a debt of the bankrupt, for they were not incurred for his benefit or at his request.¹ I have held, and I think it is the only safe and correct rule, that even upon applications for the payment of such costs from the estate of the bankrupt, payment will not be ordered, unless it be shown that the attachment proceedings were auxiliary to contemplated bankruptcy proceedings, and beneficial to the estate. This is the rule adopted and enforced by Judge Longyear.²

III. The validity of the demand in favor of the attaching creditors is not disputed. The contest here is upon the alleged claim in favor of H. P. Hatje, who is the father of the debtor. It is a claim not personally asserted by H. P. Hatje, nor resisted by A. W. Hatje, for neither of these parties appear. It is presented by the attaching creditors and contested by the petitioning creditors. The proof satisfactorily shows that originally there was a genuine indebtedness for \$600, owing by the debtor to his father. A small payment was made upon it, leaving due \$595. The question is, was a preferential payment of the balance of this debt made, at or about the time the debtor absconded? To show such payment,

¹ *In re Fortune*, 3 Bankruptcy Register, 83; *In re Preston*, 6 Bankruptcy Register, 545.

² *In re Ward*, 9 Bankruptcy Register, 349; see also *Gardner vs. Cook, Assignee*, 7 Bankruptcy Register, 846.

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the petitioning creditors rely upon certain letters written by the debtor at Chicago and San Francisco, since he absconded, to third parties in Milwaukee. These letters contain important disclosures concerning the object and circumstances of the writer's departure, and reveal strong indications that one of the purposes of his flight was to save money for his father. But it is earnestly contended that these letters are not admissible in evidence, and when the point was first made I doubted their admissibility. The fact, however, must not be ignored, that the letters are the declarations or admissions of a party to the record—the debtor proceeded against. The admissions relate to a claim against himself in favor of one supposed creditor, but interposed by other creditors and resisted by the petitioning creditors. All are parties to a proceeding which is something more than a mere suit between the creditors petitioning, and the debtor. "It rather partakes of the nature of a proceeding *in rem*," and all creditors are parties in interest.¹

It is a well-settled principle, that the declarations of a party to the record, or of one identified in interest with him, are, as against such party, admissible in evidence. Now in this case the attaching creditors are interposing a supposed claim held by another alleged creditor against the debtor to defeat adjudication. Here is, to some extent at least, identity of interest, and although the attaching creditors, by reason of their interest, are permitted to appear, and to the extent of their individual interest do independently appear and contest this proceeding, they nevertheless, so far as the creditors concerned are interested in having an adjudication, represent the debtor, and speak as well for him as for themselves in setting up this claim. It is right, therefore, that they should abide by the admissions of the debtor, and in this state of the case I do

¹ *In re Boston, Hartford & Erie Railroad Company*, 6 Bankruptcy Register, 218.

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not discover that it is a violation of rules of evidence to permit them to stand as testimony on the point involved. If H. P. Hatje were prosecuting the claim, and the debtor were seeking to defeat it, his admissions of its validity would be competent evidence to support it. His admissions of its payment are, I think, likewise admissible in this controversy, where creditors struggling to maintain a preference by attachment are endeavoring to defeat adjudication of their debtor as a bankrupt by asserting this claim to be a subsisting unpaid demand. These letters show, I think, that at or about the time the debtor left, he paid his father \$500 on the demand in question. In one of them he says that he had to leave as the only way to save at least the greatest part of the money for his father. Again he says, in order to do this, he was obliged to let other creditors lose, and speaks of the necessary secrecy of his departure. The letters, taken together, show a payment of \$500, that he borrowed \$50 from his father for the journey, and that he still owes him \$150, the \$50 being part of that amount. This state of facts presents the question whether there is any part of this \$150 which ought not to be counted, in estimating the amount of the debtor's provable debts. Apart from the question whether the balance of the debt of \$595 yet unpaid is provable (the creditor having received a partial payment under the circumstances named), I can have no doubt that the debt of \$50, created in aid of the debtor's flight, is not provable. To depart from the state with intent to defraud creditors is an act of bankruptcy. To furnish a party with money for the purpose of aiding him in committing the act, is to participate in the fraud. To permit a party thus to assist another in the commission of an act of bankruptcy, and then to allow him to assert his claim for money thus furnished as a provable debt, and thereby defeat bankruptcy proceedings, would simply give legal effect to a fraud. Counsel for the attaching creditors urge that it is not proven that H. P. Hatje knew the purposes for which the debtor borrowed this \$50. The testimony

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shows that the debtor secretly absconded, going first to Chicago, thence to San Francisco; that he left behind him unpaid debts; that he provided for the payment of his father's claim to the extent that he was able, and that this was one of the purposes of his departure; that his family accompanied him; that H. P. Hatje, the father, also left Milwaukee; that a few weeks before leaving he stated that his son was to pay him his money, or part of it, and that he was going to Germany, and one of the letters written by the debtor distinctly states that his parents went away with him. Unless all inferences from this testimony be dispensed with, the conclusion is unavoidable, that H. P. Hatje must have known the purpose for which the \$50 was borrowed from him by his son. It is true that fraud is not to be presumed, but fraud may be shown by circumstances. The circumstances here satisfy my mind upon the point. As to the amount of fifty dollars loaned by H. P. Hatje to the debtor, the case "falls within the principle of the maxim *ex turpi causa, non oritur actio*." *In re Stephens*, 6 Bankruptcy Register, 536. Whether the remaining one hundred dollars of the original indebtedness is provable, the debt being single and entire, and a payment in preference having been made upon it, it is not necessary to decide. Classing it with the claim of the attaching creditors as provable, but rejecting the item of fifty dollars before referred to, the claims of the petitioning creditors amount to more than one-third of all provable debts.

Exceptions to register's report are overruled and order of adjudication will be entered.

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In re THEODORE NOESEN.

DISTRICT COURT.—EASTERN DISTRICT OF WISCONSIN.—SEPTEMBER, 1875.

In Wisconsin, a demand barred by the statute of limitations is not provable against the estate of a bankrupt.

G. W. Foster, for petitioning creditors.

E. S. Turner, for bankrupt.

DYER, J.—The single question here presented is, whether a claim barred by the statute of limitations of the state of Wisconsin, is provable in bankruptcy. The question arises upon a contest between the petitioning creditors and the debtor, the latter seeking to defeat the petition on the ground that one-fourth in number and one-third in amount of creditors holding provable debts against him have not joined in the petition. To support this claim he interposes demands against himself in favor of his father-in-law, on their face barred by the statute of limitations.

The bankrupt act provides that a petition for adjudication must be made by one or more of the debtor's creditors, who shall constitute one-fourth thereof, at least, in number, and the aggregate of whose debts provable under the act amounts to at least one-third of the debts so provable. Is a demand barred by the statute of limitations of this state, a debt owing by the bankrupt and provable under the act?

In England the question has been put at rest by adjudications, that a debt, the recovery of which by action may be

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defeated by a plea of the statute of limitations, cannot be proved in bankruptcy.¹

Four cases are reported in Vol. I. of Nat. Bankruptcy Register Reports which I proceed to notice. In *In re Kingsley*, 1 Nat. Bankruptcy Register, 329, one of the questions was whether a debt barred by the statute of limitations of the state of Massachusetts, where the bankrupt then resided, and where the proceedings were had, but not barred by the statute of limitations of Vermont, where the creditors resided and where both parties resided when the contracts were made, could be proved against his estate in bankruptcy. Upon a full discussion of the question, Judge Lowell decides that a debt barred by the statute of limitations of the state where the bankrupt resides, cannot be proved against his estate in bankruptcy. The decision is made to rest upon the English authorities, and upon the principle that statutes of limitations are remedial, and that after the lapse of the statutory period for bringing actions, payment must be presumed. It must, however, be observed, that in this case the question was, whether the claim could be proved, not whether it was provable. Judge Lowell says: "There can be no doubt that this is a provable debt, and that it will be discharged by the certificate if the bankrupt obtains one. All debts which by their nature are provable, are discharged, whether they in fact could be proved or not. * * * Because this debt is provable, it does not follow that it can be proved. The question is whether it is a debt at all. * * * Applying the law of the forum, I find as a presumption of law, that this provable debt has been paid." Thus a distinction is taken between a provable debt, and a debt which, though provable cannot be proved. So that it will be seen this case is not an authority fully applicable to the question we have here, for the point here is. Is such a debt provable?

¹ *Ex parte Doodney*, 15 Vesey, 479.

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In *In re Harden*, 1 Nat. Bankruptcy Register, 395, Judge Fox, following Judge Lowell, holds that a debt barred by the statute of limitations of Maine, where the bankrupt resided, could not be proved against his estate in bankruptcy by a creditor resident in another state. He says: "I have no doubt that for the purposes of the discharge, these demands are to be considered as provable debts, and that if the bankrupt obtains his discharge, he will be protected against them, that his discharge will operate against them. Such demands are of a provable character, but are no longer "due and payable" within the meaning of the act, because the law of the forum designated by Congress for the adjudication of the matter, presumes they are paid, and a paid demand no longer exists as a provable legal cause of action against the debtor."

In *In re Sheppard*, 1 Nat. Bankruptcy Register, 439, Judge Hall, adopting the view of Judge Blatchford, in a case which will be next noticed, holds that a debt barred by the statute of limitations of the state in which the bankrupt resides, may still be proven against his estate in bankruptcy. The principles he invokes are, that a debt against which the statute of limitations has run, is still a debt; that the operation of the statute does not extinguish the debt, but only affects the remedy, and that statutes of limitation have no effect beyond the territorial limits of the state enacting them.

In *In re Ray*, 1 Nat. Bankruptcy Register, 203, Judge Blatchford gives to the question an elaborate examination. Conceding the rule in England to be as stated, he makes a distinction between the English statute of limitations and the statutes of limitation in the American states. He says: "The English bankruptcy law is co-extensive as to territorial operation with the English statute of limitations. The bankrupt act of the United States operates in all the states as well as in New York. Under these circumstances, I think," he says, "that a debt, to be barred by limitation so as not to be provable under the bankrupt act as not being due and payable, must be shown to be barred throughout the United States."

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Referring to the statute of limitations of New York as applicable to simple contracts, and which is identical in language with the Wisconsin statute, Judge Blatchford holds it to be a statute affecting the remedy only and not the contract, and says it could never be "invoked as a bar to an action in another state" on the contract. He says further in his opinion, that "a complaint setting out a cause of action which appears to have accrued more than six years before the action was commenced, is not objectionable on its face or open to a demurrer. The defense of the limitation must be set up by answer. If it is not so set up, it is waived." Recognizing the distinction between a law which extinguishes the contract as the result of limitation, and a law which simply limits the time within which an action may be commenced upon the contract, and holding that a law of the latter character cannot be invoked as a bar to an action on it in any other country, he construes the statute of New York as not barring the debt and as not affecting the contract, but as merely reaching to the remedy, and so concluding that a debt is provable in bankruptcy unless barred throughout the United States.

Thus it will be seen from these decisions that the question turns upon the point as to whether the effect of the statute is to destroy the contract and extinguish the liability, or merely to affect the remedy on the contract. Without considering the distinction taken by Judge Blatchford on the English decisions, upon which he concludes that a debt must be barred throughout the United States so as to make it a debt not provable under the bankrupt act by reason of limitation, it is sufficient to say that the courts of this state place upon the statute of limitations a construction radically different from that given by Judge Blatchford. To illustrate: Although the statute of Wisconsin, like the statute in New York, requires that the defense of the statute of limitations must be set up by answer, the Supreme Court of this state have held, that where it appears upon the face of the complaint that the plaintiff's claim is barred by the statute, the

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objection may be taken by demurrer, and that in such case the demurrer is an answer within the meaning of the statute.¹

Further, the Supreme Court of this state have held in *Brown vs. Parker*, 28 Wisconsin, 22, that the lapse of time fixed by the statute of limitations of this state, as to parties residing therein, does not merely affect the remedy, but extinguishes the right, and that this applies to contract debts as well as to the title to property. This is a very strong case, and one in which Justice Dixon elaborately reviews the law on the question, holding that under the statute the debt by lapse of time becomes a nullity, and as if no debt or promise had ever existed. The result of this decision upon the facts of the case was, that where a note made in this state, of which the maker and holder were residents, had been barred, and the debt thus extinguished (by the law of this state as interpreted by its courts), and the note was then sued upon in a court of Illinois, the defense upon the *lex loci contractus*, if set up there, would have been good, and a judgment upon such note entered in Illinois by confession upon warrant of attorney, was relieved against. The principle that, as to parties residing in this state, the statute of limitations does not affect the remedy only, but directly extinguishes the right after the statutory period has elapsed, was also settled in this state in *Sprecker vs. Wakeley*, 11 Wisconsin, 432; and *Knox vs. Cleveland*, 13 Wisconsin, 245. Now, it is a settled principle that the *lex fori* must prevail as to statutes of limitation. "The federal courts sitting within the respective states, regard their statutes of limitation, and give them the interpretation and effect which they receive in the courts of the state."² Giving to the statute of limitations of this state the interpreta-

¹ *Howell vs. Howell*, 15 Wisconsin, 55. See also *New Jersey vs. New York*, 6 Peters, 323.

² *In re Cornwall*, 6 Nat. Bankruptcy Register, 318; *Shelby vs. Grey*, 11 Wheaton, 361; *McClung vs. Silliman*, 3 Peters, 270; *Green vs. Neal's Lessee*, 6 do., 291; *Ross vs. Duval*, 18 do., 45.

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tion placed upon it by the courts of the state, I must hold that as the parties are residents of this state, the demands in question, being barred by the statute, are extinguished, and are therefore not provable claims against the estate of the bankrupt. They are as if they had never existed.

The views I have expressed are, I think, strongly sustained by Judge Woodruff in *In re Cornwall*, 6 Nat. Bankruptcy Register, 305.

The statute of limitation is in Wisconsin a bar to the recovery of any dividend paid more than six years previous to the commencement of the suit; the statute commences to run when the misapplication is made. *Main, Assignee, etc. vs. Mills, ante p. 98.*—[Reporter

In re MICHAEL H. SPADES *et al.* AND *In re* JAMES W. MUIR *et al.*

DISTRICT COURT.—DISTRICT OF INDIANA.—SEPTEMBER, 1875.

IN BANKRUPTCY.

1. COMPOSITION MEETING.—Instructions given to Indiana registers as to manner of calling and conducting composition meetings.

2. CALCULATING MAJORITY.—The proper construction of the clause as to calculating a majority is that creditors whose debts do not exceed \$50, shall be counted in determining the value, but not in determining the number.

3. SECURED CREDITORS, are those who hold a lien upon property which otherwise would go into the general fund, not those who have personal security. This latter class may prove and vote as unsecured creditors.

4. ACCEPTANCE IN PARTNERSHIP CASES.—A composition should not be allowed to work inequality or injustice, as between individual and partnership creditors. If there is no objection, the creditors may direct a general composition, which is the most simple; but if any creditor objects, he has the right to a vote by the separate classes of creditors.

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5. **CONFIRMATION.**—The court, before confirming the composition, should see that it works no injustice to any class of creditors, and if it does, should give redress accordingly.

Bixby & Norton, for Register.

GRESHAM, J.—By the amendment to the 43d section of the bankrupt act, provision is made for the disposition of pending cases by means of a composition between the bankrupt and his creditors.

In certain cases when composition proceedings are pending, application is made to the court to settle questions of practice, and for the better regulation of this method of settlement, the following statement is made for the direction of registers:

Upon an application to the court by a bankrupt whose case is pending, setting forth that he proposes to compound with his creditors an order will be made and certified to the proper register, directing him to call a meeting, and to give notice of not less than ten days to each known creditor of the time, place and purpose of such meeting. These notices will be sent by mail, properly addressed and postpaid, and a memorandum will be entered by the register to the effect that he has received the order of the court and given the notices required.

The record of the register should show that at the time appointed the bankrupt appeared in person, or if from some lawful cause prevented from so appearing, then by another person on his behalf, with a statement of the whole of his debts and assets, showing also the names and addresses of the several creditors.

The proposition of the debtor being submitted, must then be adopted by a majority in number and three-fourths in value of the creditors of the debtor assembled at such meeting, voting either in person or by proxy.

This alone does not authorize the submission of the composition to the court, for an additional step must then be taken, that is, the resolution must be confirmed by the signa-

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ture of the debtor and of two-thirds in number and one-half in value of all the creditors of the debtor. If the vote of those assembled at the meeting does not amount to a majority in number and three-fourths in value, the matter is at an end. But should that vote be given in that number and value, of those so assembled, a further step must be taken to confirm it by securing the signature of the debtor to the resolution, and also the signatures of a larger proportion of the creditors, to-wit: two-thirds in number and one-half in value of all the creditors of the debtor. This provision of the law is designed to protect the creditors from the effect of a resolution adopted by a smaller number assembled at such a meeting. The smaller number may adopt the resolution, but the larger number must confirm it, and it is plain from the language of the act that after the adoption of the resolution a reasonable time may be given to secure such additional signatures as may be required to confirm it.

A question arises upon the further provisions of the section as to how this voting and confirming is to be counted. The language of the amendment is: "And in calculating a majority for the purposes of a composition under this section, creditors whose debts amount to a sum not exceeding fifty dollars shall be reckoned in the majority in value, but not in the majority in number."

This language, which directs what shall be counted in the majority, is not free from obscurity. The majority, however, can only be ascertained by making the count, and as the method of making it is to be first determined before the vote is settled, it seems that the reasonable interpretation of this provision is that in settling the composition, whether for or against, creditors whose debts do not exceed fifty dollars shall not count in determining the number, but shall count in determining the value.

As to secured creditors, they are not counted at all unless they satisfy the register that there is an excess due them over the value of the security. That excess being determined

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by the register, they are admitted to the vote as are the creditors whose demands are unsecured.

If, however, a secured creditor abandons his security, he is admitted to vote as one unsecured.

It is proper here to observe that the secured creditors to whom this exception applies are those who are secured by the pledge, in some form, of property that, apart from their lien upon it, would go into the fund for general distribution. The language is general, to be sure, and construed strictly and without reference to other provisions of the statute, might be made to embrace those creditors who have personal security. But the law makes provision elsewhere for the protection of such sureties, allowing them to prove in full when they have paid the debt, and provides for their subrogation to the right of the creditor, if he shall have proved, and they afterward pay the debt. The provision for the abandonment of the security can only apply to such security as may be surrendered to the general fund, and can have no application to that form of security which could be abandoned only for the benefit of the surety, and not for the increase of the fund. It follows, of course, that a creditor having personal security votes upon composition proceedings as an unsecured creditor.

The question of the effect of partnership relations in making a composition presents more difficulty. The law is silent as to partnerships. It proceeds apparently upon the theory that the debts and assets are all of a single class. It does not provide for a classification of debts and assets as being individual and partnership, and for a several vote and counting among the different classes of creditors. Are the creditors of A, and those of B, and those of the firm of A & B, to be all counted together in determining the required numbers and values in these several stages for settling a composition? Or, are they to be separated into classes and to vote and be counted in such classification before the question of composition can be determined?

The act provides carefully in section 36 for the marshaling of

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the debts and assets and the distribution of the several individual and partnership funds, according to the well-known equity rules. The creditors being so entitled, it is easily seen that very gross inequality might in some cases result by a vote for composition without requiring a classification. If the personal assets of partners are small and the personal debts large, the personal creditors could expect only a proportionate dividend, and therefore could readily vote for a composition that would be unjust to the partnership creditors, unless a similar ratio existed between their debts and the partnership fund. If their debts were in the aggregate comparatively small and the partnership fund large, they could, by the preponderating vote of the personal creditors, be driven to accept a composition which would be greatly below the amount of their dividends were the cause to proceed to settlement by the assignee.

Congress could not have contemplated and intended any such inequality. The cases, however, to which the attention of the court has been called are cases where the meetings have been held upon general notice to all creditors, both individual and partnership, and where the vote has been made by the creditors who assembled and those who signed the confirmation of the resolution, without any classification and without any objection on that ground from any creditor. The state of the respective debts and funds may be such as to justify this course; and where they are so it simplifies the proceedings very materially. Whether this condition of practical equality of the debts and assets, both individual and partnership, exists, is shown to the creditors at the composition meeting, and it is their province to act upon it as they see proper. They may make the composition by general vote and general confirmation, if they are content with it. Or, if one of any class of the creditors perceives that the other class is about to force upon him an unjust composition, he can demand a separate vote, and so protect himself by calling to his assistance those who compose the class to which he belongs.

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It would seem that by this application of the law no injustice can be done. There remains a second meeting to be called by the court, after notice to every known creditor, for the final allowance of the composition by the court, if it shall be found to be fair and to have been conducted according to law. Should it appear at this meeting that the common voting of all creditors, individual and partnership, together worked injustice, the court can then consider if any and what redress should be given.

WILLIAM S. WARNER vs. AARON H. CRONKHITE.

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—SEPTEMBER, 1875.

1. **DEBT CREATED BY FRAUD**—is not discharged in bankruptcy, even though reduced to a simple judgment for money, in which there is no mention of fraud; if the original action was based upon fraud, the fraud is not merged in the judgment.

2. **EFFECT OF AGREEMENT NOT TO ARREST.**—A stipulation between the parties after the judgment, by which the plaintiff waived his right to execution against the body of defendant, does not affect this question of discharge.

3. **MASSACHUSETTS INSOLVENT LAW**, and many cases commented on and distinguished.

This action comes into this court by removal from the Circuit Court of Outagamie County.

The complaint sets forth the following state of facts: That on the 11th of June, 1859, the plaintiff brought an action against the defendant in the Circuit Court of Outagamie County, to recover damages claimed to have been sustained

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by the plaintiff, by reason of alleged frauds practiced by defendant upon plaintiff in the sale of certain lands; that the action and the right of the plaintiff to recover therein were founded solely upon the said frauds; that issue was joined in that action by the parties thereto, trial by jury had, and verdict and judgment were rendered in favor of plaintiff against defendant for \$1258.87, damages and costs; that this judgment has never been appealed from, reversed or set aside, and has not been paid.

The complaint then alleges, that after the rendition of this judgment, the defendant procured from the United States District Court for the Eastern District of Missouri, his discharge in bankruptcy, and that the defendant claims that by this discharge his liability to the plaintiff, upon the debt represented by the judgment, is discharged. The complaint next alleges, that the debt represented by the judgment was created solely by the fraud of the judgment debtor, and that the debt is not canceled by the discharge in bankruptcy; and closes with the allegation that this action was commenced upon such judgment by leave of the Circuit Court of Outagamie County, and judgment is demanded for the amount alleged to be due upon said former judgment, with interest.

The defendant answers this complaint and says, that after the rendition of the judgment mentioned in the complaint, the parties to that judgment entered into a written stipulation, by which the plaintiff waived his right to an execution against the body of defendant upon the judgment, and expressly agreed that no execution should ever be issued against the body of the defendant in that action; and by which stipulation the defendant, on his part, waived all errors in entering said judgment, and in all orders prior to the entry thereof, and further agreed that he would not take any appeal from the judgment or any of said orders. It was further stipulated between the parties, that said judgment should be and remain in all respects binding upon the real and personal property of the defendant, and that no other or further right of

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the plaintiff than that of execution against defendant's body, was relinquished by the stipulation.

To this answer the plaintiff interposed a demurrer, and the question is, does the stipulation set forth in the answer constitute a defense to this action?

Annexed to the complaint is a certified copy of the judgment record in the original action, from which it appears that that action was founded upon certain alleged false and fraudulent representations made by defendant to plaintiff in an exchange of property between the parties. The gravamen of the complaint in that action, and the gist of the action, was fraud. The judgment rendered was in terms and form a simple money judgment, no reference to the ground of action being mentioned therein.

D. G. Hooker, for plaintiff.

Finches, Lynde & Miller, for defendant.

DYER, J.—Section thirty-three of the bankrupt act provides, "that no debt created by fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt." It is claimed by the plaintiff that the ground of the action in which the judgment now sued on was rendered being fraud, the debt was not discharged by the bankruptcy proceedings, and that the stipulation in question did not extract from the judgment, which at the time of the bankrupt's discharge represented the debt, the element of fraud upon which it was originally founded. It is claimed by defendant's counsel that the original debt or claim was merged in the judgment; that to show the alleged fraud, within the meaning of section thirty-three of the bankrupt act, so as to make the debt in this case one from which the defendant was not discharged by the bankruptcy proceedings, it must be dis-

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closed by the judgment itself, that it was necessarily based upon the fraud, and that in any event the stipulation made by the parties gave to the judgment the character of a mere contract debt, which was discharged by the debtor's discharge in bankruptcy.

When the original action between these parties was commenced, and when the judgment here sued upon was rendered, there was no statute in force in this state authorizing an arrest of a defendant, or an execution against his body in a case where fraud in contracting a debt or incurring an obligation was the sole ground of action. It was not until 1868, that a statute was enacted, authorizing an arrest in such a case. So that, although the parties seem by their stipulation to have supposed that the right to an execution against the body in that action then existed, in fact it did not exist. This being so, that stipulation becomes insufficient as a defense to this action, if the action itself can be maintained. For it is apparent that the plaintiff's demurrer to the defendant's answer reaches back to the question whether the original demand, debt or judgment, was discharged by the defendant's discharge in bankruptcy, and consequently, whether this action will lie. There is some conflict of authority upon the question as to whether a recovery of a judgment upon a debt fraudulently contracted merges the original cause of action, so as to relieve from liability to arrest, even where there is a statute authorizing arrests in civil actions founded upon fraud. In the case of *McButt vs. Hirsch*, 4 Abbott's Practice R., 441, it was held, that in an action upon a judgment recovered upon a debt fraudulently contracted, the defendant was not liable to arrest on the ground of fraud in the original debt, and that the original cause of action was merged in the judgment recovered upon it. It will be observed here, that the point was not whether an execution could be issued upon the judgment against the body of the defendant, but the question was, whether, in a new action upon the judgment, the defendant could be arrested because of the fraud in the original

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debt; and in this state of the case the principle above stated was applied.

In the case of *Mallory vs. Leach*, reported in note to 14 Abbott's Practice R., 449, there was a similar decision of the question. A judgment was recovered in an action for fraud. Another action was brought upon that judgment, and it was held that this second action was upon contract, and not for fraud, and the defendant could not, therefore, be arrested.

I have referred particularly to these two cases, because they as strongly affirm the principle of merger as any I find. The case at bar must be distinguished from those cases. We do not have here an action upon the judgment with an accompanying proceeding to procure an arrest, on the ground that the original cause of action upon which the judgment sued on was recovered, sprung from the defendant's fraud. The question here is, whether the original cause of action was so merged in the judgment, and the original fraud so extinguished by the judgment, that it must now be held a debt which was discharged by the defendant's discharge in bankruptcy.

Judge Blatchford, in the case of *Patterson*, 1 Nat. Bankruptcy Register, 307, after stating that the point involved was whether the debt in that case was one excepted by section thirty-three of the bankrupt act from the operation of a discharge, says: "It is claimed on the part of the bankrupt that the debt being in the shape of a judgment, this court cannot, in applying the 33d section, go behind the judgment to see whether the claim on which the judgment was recovered was created by fraud; that the judgment, which is now the only debt, was created by the claim and not by the fraud, and that though the judgment was created by the claim, and the claim by the fraud, yet the judgment was not created by the fraud. This view is unsound. Wherever the debt, no matter whether it be in the shape of a judgment or in any other form, was created by fraud, had its root and origin in fraud, then it is not to be discharged. To hold that the recovery of

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a judgment in an action where the gravamen of the complaint is fraud, condones that very fraud by so merging the original claim that the judgment cannot be said to be a debt created by the fraud set out in the complaint as the ground for recovering the judgment, would fritter away entirely the good sense and plain intention of the 33d section."

The same principle is recognized and applied by Judge Lowell, in *In re Whitehouse*, petitioner for *habeas corpus*, 4 Nat. Bankruptcy Register, 63, and I think that the conclusions arrived at in these cases are sound, when applied to a case in which it appears by the record that the original demand or cause of action sprung from fraud. Now, in the case at bar, what does the record show? The complaint in the action in which the judgment sued on was rendered, shows a cause of action springing exclusively from alleged fraudulent representations in an exchange of property. It was not an action upon contract with immaterial allegations of fraud, but it was an action grounded solely upon the fraud. The summons in the action was not upon a liquidated money demand, but in terms demanded relief as it should in an action to recover unliquidated damages. The issue joined between the parties was upon the question of fraud, as appears by the complaint and answer. There was a trial by jury and an assessment of damages, and a judgment upon the issue of fact involved was entered on the verdict. Was it necessary that the judgment on its face should show that the ground of the action, or that the origin of the plaintiff's demand was fraud, in order to make it a case of a debt or demand created by fraud not dischargeable under the bankrupt law? I cannot think so. As the record of the action "shows a material and traversable allegation of fraud as its sole foundation, the debt or demand may fairly be said to be one founded in fraud, and the action to be one founded upon a debt or claim from which the bankrupt's discharge would not release him." *In re Whitehouse*, 4 New Bankruptcy Register, 63. The distinction must not be ignored between the question as it presents

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itself in the case at bar and as it would be presented in a case where the allegations of fraud in the original action were incidental and immaterial, or in a case of an attempted remedy against the person of the defendant in an action on the judgment. Upon the record, it would seem that had there been no fraud, there could have been no claim, and had there been no fraud, and consequently no claim, there would have been no judgment. Accepting the record as evidence of the character of the original cause of action, the debt in this instance, though now represented by a judgment, was created by fraud, and so excepted by the bankrupt act from the operation of a discharge.

Shuman vs. Strauss, 52 New York, 404, is cited by defendant's counsel. But that was an action for the recovery of money only, and the summons was in the form prescribed by subdivision one of the section of the code relating to the form of the summons, which subdivision has reference to actions upon liquidated demands. It was held in such a case that upon the non-appearance of the defendant, judgment being perfected upon an assessment of damages by the clerk, the defendant is not concluded by the allegations of fraud in the complaint; but that the plaintiff's right of action for, or remedy under the statutes by reason of the fraud, is merged in the judgment. The court, after speaking approvingly, as I understand their decision, of the doctrine laid down in the case of *Patterson*, 1 Nat. Bankruptcy Register, 307, and some other similar cases, say that they come far short of the claim of the plaintiff in the case then decided, and a mere statement of the character of that case, as already given, makes the correctness of that observation of the court obvious.

Wood vs. Henry, 40 Hand's New York, 124, is also cited.

In that case the defendants, as commission merchants, received certain property for sale from the plaintiff. They sold the property, but did not account for the proceeds. These facts were alleged in the complaint, and so it appeared that the defendants acted in a fiduciary character. Judgment was

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taken by default. No order of arrest had been obtained during the pendency of the action, and the question was whether an execution upon the judgment could be issued against the persons of the defendants. A majority of the court held that the allegations of the fiduciary character of the defendants were not traversable, and that no execution could issue against the person upon the judgment, because the cause of action did not necessarily import liability to arrest, the cause of action and cause of arrest not being identical. In other words, upon trial, proof of the fiduciary relation was not indispensable to recovery. Here is a plain distinction between that case and this at bar; for here there could have been no recovery without proof of the alleged fraud, for the fraud was the entire basis of the action. It was, in short, the sole cause of action. *Prouty vs. Swift*, 51 New York, 594, is in character and principle like *Wood vs. Henry*, while *Roberts vs. Prosser*, 53 New York, 260, enforces the principle applied in the case at bar, as distinguished from the other cases cited. I do not think *Bangs vs. Watson*, 9 Gray, 211, is applicable to the question we have here. The original cause of action in that case arose upon contract. Judgment was recovered, and it was held that there was a merger of the original indebtedness in the judgment, and that the judgment did not, within the provisions of the insolvent law of Massachusetts, constitute a claim for necessities not dischargeable under the act, although the original demand was for necessities. The language of that act was: "No discharge of a debtor shall bar any claim for necessities furnished to such debtor." The language of the 33d section of the bankrupt law is: "No debt created by fraud shall be discharged under this act." The Massachusetts statute specifies the claim in the form in which it exists at the time of insolvency proceedings. It must, then, to be excepted from the operation of a discharge, be in the form of a claim for necessities, and it is not in such form when in judgment. The language of the bankrupt act requires an inquiry into the origin, the creation of the debt,

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and if created by fraud, it is not to be held discharged. In the case of *Palmer vs. Preston*, 45 Vermont, 154, cited by defendant's counsel, the action was upon contract. Fraudulent representations had been made to procure a certain indorsement, but the fraud was not the foundation of the judgment recovered. The judgment was held to be discharged by the bankruptcy proceedings, and not to be within the exception of the 33d section of the bankrupt act, because the debt in question was created by contract, and as the debt had been treated as a demand so created, it was held that the fraud was waived. The case is, therefore, inapplicable to that under consideration.

The demurrer to defendant's answer must be sustained.

HARTFORD FIRE INSURANCE COMPANY vs.
PETER DOYLE, SECRETARY OF STATE.

CIRCUIT COURT.—WESTERN DISTRICT OF WISCONSIN.—SEPTEMBER, 1875.

1. WISCONSIN STATUTE PROHIBITING NON-RESIDENT CORPORATIONS FROM REMOVING SUIT INTO FEDERAL COURTS.—The Wisconsin statute of March 14, 1870, that no non-resident corporation should remove a suit from the state to the Federal courts, having been declared unconstitutional by the United States Supreme Court, the provision of the statute of April 5, 1872, requiring the Secretary of State to revoke the license of any such corporation applying for such removal falls with it.

2. JURISDICTION OF UNITED STATES CIRCUIT COURT.—The United States Circuit Court can in such case grant an injunction restraining the Secretary of State from attempting to forfeit the license.

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This was a bill filed by the Hartford Fire Insurance Company of the State of Connecticut against Peter Doyle, as secretary of state, for an injunction restraining him from proceeding to revoke and recall the license or certificate of authority granted by the state to such company to transact business in this state.

The bill shows that the state granted a license in January, 1875, to continue in force one year, in consideration of the covenants and conditions contained therein, among which was one to not remove or cause to be removed any suit commenced against the company in this state, into the federal courts for trial, which provision was inserted in compliance with the terms of section 22, chapter 56, Laws of 1870. The Legislature subsequently, in order to more effectually secure an observance of such provision, by an act approved April 5, 1872, declared that if any company should make an application to remove a case commenced against it into the United States Circuit Court for trial, contrary to the provisions of the laws of the state, or of their agreement made under the provision of the section of the act of 1870, above mentioned, that it should be the imperative duty of the secretary of state to revoke and recall the license of such company to transact business in this state.

The bill shows that an agent of the company, having charge of its business in this state, did take steps to remove a case commenced against it in the circuit court of Winnebago county, to the United States Circuit Court for the Eastern District, for trial; that such action was taken without consultation with the home office, and that upon notice of it, the case was by stipulation offered to be remanded to the state court for trial; but that, notwithstanding such stipulation to re-transfer, an application had been made to the secretary of state to vacate and recall their license, and that the secretary now has the application pending before him, and states that he deems the duty imposed by the act upon him imperative. And the bill alleges that the complainant believes that, unless

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restrained by some court of competent authority from so doing, he will cancel their license; and that thereby irreparable injury will be done to complainant's business.

Sloan, Stevens & Morris, for complainant.

A. Scott Sloan, Attorney General, for defendant.

HOPKINS, J.—The only matter discussed on the hearing before me was the constitutionality of the statutes on the subject.

There is a conflict upon the question of the constitutionality of this act between the state and federal courts.

The Supreme Court of this state in *Morse vs. Insurance Company*, 30 Wisconsin, 496, decided that the provisions of the act of 1870, requiring the agreement not to remove to the federal court for trial, constitutional, but the Supreme Court of the United States, in same case on error, 20 Wallace, 445, reversed that decision, and held the act of the legislature requiring such restriction unconstitutional and void, and that the company could remove, notwithstanding their agreement not to do so, entered into under that act. So if the question presented here is substantially the same as that presented in that case, that decision is decisive of this motion.

The attorney general on the hearing claimed that the question was different; that the state had a right to impose such terms as it might deem just on admitting foreign corporations to transact business here, and no court could inquire into the reasonableness of such terms; that the state could also provide that a forfeiture of the right to continue to do business should follow a breach of any conditions or restrictions they might exact or impose; in other words, that the state had the right to say when and for what cause or causes the license might be revoked, and that no court had the right to say that the cause or causes were insufficient. If

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this were the theory of the state, as manifested by this legislation, it might present a somewhat difficult question.

But I am not prepared, however, in view of the authorities on the subject, to concede that such arbitrary and unlimited power resides in the states.

In the *Lafayette Insurance Co. vs. French*, 18 Howard, 404, it is held that the consent may be upon such condition as the state may see fit to impose, "provided they are not repugnant to the Constitution and laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity" for defense. And in *Ducat vs. City of Chicago*, 10 Wallace, 415, it is said as to "the nature or degree of discrimination, it belongs to the state to determine, subject only to such limitations upon her sovereignty as may be found in the fundamental law of the Union."

"Parties cannot by any agreements confer jurisdiction when it is not given by an act of Congress. When so given, they cannot oust the courts of the United States of the jurisdiction conferred upon them."¹

But in deciding this motion, in view of the decision of *Morse vs. Insurance Co.*, *supra*, it must be assumed that the power of the state to pass a law prohibiting a foreign corporation from removing a case for trial into a federal court, does not exist; and that all obligations and restrictions of that character imposed upon foreign corporations by the act of 1870, are not binding, but are absolutely void. Now, does the law of 1872, based upon that act, and directing certain proceedings for a violation of the provisions of that law, fall, also? Or, may the state rightfully pass acts imposing penalties for

¹ *Hobbs vs. Manhattan Insurance Co.*, 56 Maine Reports, 421; *Cobb vs. New England Insurance Co.*, 6 Gray, 192; *id.*, 596; *id.*, 174; *Davis vs. Packard*, 6 Peters, 41; S. C., 7 do., 276.

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a violation of that act, which are obligatory upon the state officers, after the law requiring the company to perform them is held void?

If this is a part of the scheme intended by the legislature to enforce the law, and the power to establish this condition is held not to exist, it seems to me that all the penalties, remedies and proceedings predicated upon its non-observance would fall with the power itself.

It would be unreasonable to suppose that the legislature would pass an act requiring the secretary of state to cancel the license for want of compliance with a requirement that they had not the power to impose.

Chief Justice Marshall, in *Wayman vs. Southard*, 10 Wheaton, 1, says: "It is a general rule that what cannot be done directly from defect of power cannot be done indirectly." And Chief Justice Dixon, in *Morse vs. Insurance Co.*, *supra*, says: "It may be conceded that any state legislation intended or calculated of itself or by its own mere force to defeat or prevent the exercise of the right of removal when it exists, is unconstitutional and void."

The Supreme Court of the United States has decided that the right of removal does exist here, so that it follows, according to Judge Dixon's opinion, that this legislation, so far as it was "intended or calculated" to "defeat or prevent" the exercise of the right of removal, is void.

The provision of both acts are to be construed together; the last founded upon the first, declaring the consequences or penalty of a violation of the first, and making the secretary of state the instrument to enforce the penalty for a violation of the first. The title of the last act shows this. It is entitled "an act to provide for the enforcement of the laws in certain cases," and those laws, so far as applicable to this case, having been held null and void, all laws providing for their enforcement must be inoperative, and no court or officer can enforce any penalty or forfeiture for their non-observance.

If I am right in this view, this case does not call a decision

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on the general doctrine contended for by the attorney general. For it is plain to my mind that our legislature did not intend to forfeit the license of foreign companies, except for a violation of what they deemed a valid requirement or condition of law. There is no reason for supposing that the state intended or wished to annul a license, or to exclude a company from doing business here, except for a breach of a legal duty, and when it is settled that this company has not violated any legal duty, the power to vacate the license vested in the secretary of state, terminates.

I have not deemed it necessary to consider the general question of the constitutional right of the complainant to a removal. That is settled and does not admit of or require any argument in its support. The provision in the act of 1870, requiring the agreement not to remove, having been declared unconstitutional, that part of the act of 1872, directing the secretary of state to vacate a license in case of removal, is inoperative, and he has no authority under it to revoke or vacate the complainant's license to transact business for that cause.

I, therefore, order and direct that an injunction issue against the defendant, restraining him from so doing, as prayed in the bill.

City of Chicago vs. Gage.

CITY OF CHICAGO vs. DAVID A. GAGE.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—OCTOBER,
1875.

IN EQUITY.

REMOVAL FROM STATE COURTS.—Where the real controversy is between a city and one of its citizens, a citizen of another state, claiming to be interested in the subject matter of the litigation, has not the right to remove the suit from the state into the federal court.

T. Lyle Dickey, corporation counsel, for complainant.

M. W. Fuller, for Wm. T. Ayres, intervening claimant.

BLODGETT, J.—This case was originally commenced in the Superior Court of Cook county, and removed to this court on the application of the defendant, Ayers. A motion is now made on behalf of the complainant to remand the case to the Superior Court, because of facts appearing upon the face of the record.

The record shows that, on the 27th day of December, 1873, David A. Gage and his wife, of the city of Chicago, executed and delivered to George Taylor, also of said city, a deed conveying to said Taylor, in trust, certain property for the purpose of securing the city against loss of any indebtedness which might exist from Gage to the city, as late treasurer thereof, and for other purposes therein expressed. Said deed did not state what the amount of said indebtedness was, but declared that said conveyance was not to be, in any sense, a satisfaction of any part of said indebtedness. It included

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and conveyed to Taylor a large amount of real property, situated in Chicago and its suburbs, some portions of which were improved and yielding income. It empowered the trustee, during the period of eight months from the date of the deed, to enter immediately into the possession of said property, control and manage the same, receive and collect the rents, income and profits thereof, and out of the same pay the taxes, assessments and insurance; to sell and convey, under the direction and with the concurrence of the comptroller of the city, all or any part of said property, and out of the net proceeds of the said sales, rents, income and profits, to pay over to the city, from time to time, to apply on the indebtedness of Gage to the city, such sums as might be available for that purpose. At the expiration of eight months the comptroller was authorized to require the peremptory sale of so much of said property as should then remain unsold, for cash, and the said Taylor, as trustee, was required to comply with said request and apply the net proceeds of the sales so made to the satisfaction of the unpaid remainder of said indebtedness.

Taylor accepted the trust, entered upon the possession, control and management of the property, and made some sales thereof, and partial payments to the city within the eight months allowed for that purpose.

After the expiration of said eight months, a large portion of the indebtedness, claimed by the city, against Gage, as its late treasurer, still remaining unpaid, the comptroller ordered the trustee to sell the rest of the property on hand, for cash. Said trustee refused to comply with the order of the comptroller, alleging as the ground of said refusal, that said deed did not state the amount of said indebtedness; that he did not know the amount of it himself, and that he was unwilling to sell and pay over the proceeds of such sale to the city until a competent court had first found and decreed the balance due from Gage to the city. Thereupon the city filed the bill in this case, in the Superior Court of Cook county, setting

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out the said trust deed, and alleging that at the time of the making thereof Gage was indebted to the city, as treasurer, for a balance of five hundred and seven thousand, seven hundred and three dollars and fifty-eight cents, for the security of which it was claimed that Taylor held the property so conveyed to him by said trust deed; and prayed that the court would take an account and ascertain the amount due, and give a decree in favor of the city for the same, and order the said trustee to proceed and sell the trust property remaining unsold, and apply the proceeds of such sale to the satisfaction of the amount so found due. Gage and wife, and Taylor, were the only defendants to this bill.

Gage answered the bill, denying that he owed the city anything. Taylor also answered, stating his belief that the amount due from Gage to the city was that stated in the bill, but alleging that he did not know what was the real amount of said indebtedness, and prayed that the court would find and decree the amount of said indebtedness, and order the sale, and declare the amount to be paid by him out of the proceeds.

In February last, William T. Ayers, a citizen of Alabama, acting as executor for Charles P. Gage, deceased, late of said State of Alabama, recovered a judgment in this court against said David A. Gage for three thousand and six dollars and ninety-two cents. Execution was issued on said judgment, and returned "no property."

Thereupon Ayers applied to the Superior Court to be made a party-defendant to the bill in this case, which application having been granted, he answered the bill, and also, by leave of court, filed a cross-bill, in both of which he alleged in substance the recovery in this court of said judgment against Gage, the issue of his execution and return, and charged that said judgment was an equitable and prior lien upon the property so held in trust by said Taylor; alleging that no indebtedness, in fact, existed from Gage to the city; that by the action of the common council of the city, Gage had been per-

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mitted to loan the funds of the city, and to pay certain interest arising therefrom to the city; that by reason of certain advances which had been made from certain of the general funds to certain specific funds by Gage while acting as city treasurer, certain equitable considerations had arisen which ought to defeat and did defeat any claim at law or in equity in favor of the city against Gage, praying it might be found and decreed that no indebtedness existed from Gage to the city, and that the property conveyed by Gage to Taylor, the trustee, be legally and equitably subjected to the lien of his judgment, as against the city, and asking the court to decree a satisfaction thereof out of the same.

After having filed his said answer and cross-bill, Ayers filed his petition in the Superior Court, setting up that he was a citizen of the State of Alabama; that there was a controversy in said suit between himself and said Gage and the city, who were citizens of the State of Illinois and of this district, and asking that said cause be removed from said Superior Court to this court for trial.

The Superior Court entertained said petition and ordered the removal of said cause to this court; and the question is: Does there enough appear on the face of the record to justify this court in holding jurisdiction of the case?

The fifth section of the act of March 3, 1875,¹ provides, "That if, in any suit commenced in a circuit court, or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case

¹ 18 U. S. Statutes at Large, 470, 472.

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cognizable or removable under this act, the said circuit court shall proceed no farther therein, but shall dismiss the suit, or remand it to the court from which it was removed, as justice may require."

The first question which suggests itself to my mind in discussing this motion, is, between whom is the controversy in this case?

The original suit was brought by the city of Chicago to determine the amount of indebtedness due to it from Gage, and to require the payment of that indebtedness out of the property held in trust by Taylor, for that purpose. In his answer, in that case, Gage denied any indebtedness between himself and the city. I think it unnecessary for the purposes of this inquiry to investigate the grounds upon which Gage based that denial; it is sufficient for this motion, to say that by the bill, answer and replication in the case, as it stood at the time Ayres made himself a voluntary party thereto, the controversy in the case was between the city and Gage as to whether there was, in fact, an indebtedness, and the amount thereof, if any, from Gage to the city. The defendant, Ayres, does not raise any new controversy by his answer and cross-bill, but simply makes himself a party to that which already existed, alleging, perhaps, more in detail the grounds for denying any indebtedness from Gage to the city, but at the same time not changing in any degree the issue in the case or the character of the controversy. The main question still is, as the pleadings now stand, and as they stood before Ayres came into the case, Does Gage owe the city anything which ought to be satisfied out of the proceeds of the property held in trust by Taylor, under the trust deed described in the complainant's bill? This being so, the controversy inaugurated in the suit is simply one between citizens of this state. True, Ayres, as a creditor of Gage, may be interested in the result of that controversy, because, if it terminates in favor of Gage, it leaves the property now held by Taylor subject, equitably if not legally, to Ayres' debt, but that does not in any degree,

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in my estimation, involve a controversy between the city and Ayres in the original suit.

As was intimated by the learned circuit judge of this circuit in the case of *Osgood vs. The Chicago, Danville and Vincennes Railroad Company*,¹ the statute of March 3, 1875, clearly contemplates the removal of the whole suit from the state to the federal court, and not of such fragment or part thereof as may involve a controversy or question between two or more of the defendants. And we must look into the nature of the original controversy, which was the subject matter of the suit, to settle this question of right of removal.

A complicated chancery suit may, almost necessarily, involve in some of its collateral issues, the rights and interests of citizens of different states; but, unless the original controversy which the suit is brought to determine be between citizens of different states, or between such parties as give the federal courts jurisdiction, it would hardly seem that Congress intended to provide for the removal thereof, inasmuch as the whole case must be removed instead of that collateral branch or part involving a controversy between citizens of different states.

Applying these suggestions to the case under consideration, it would seem that the controversy as presented by the issues and pleadings, is as to whether or not Gage owes the city anything which should be paid out of this trust fund. That being determined, if determined against the city, the defendant, Ayres, may have a standing in court to claim his pay out of the trust property, but not until then. Notwithstanding Ayres' interpolation into the suit, the real questions still stand at issue between the city and Gage, and Ayres only has rights as he may be subrogated to those of Gage. It is nowhere intimated in this case that there is any collusion between Gage and the city, or that the city suit is not prosecu-

¹ Ante p. 241.

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ted in entire good faith. If it had been made to appear that Gage had given the trust deed to Taylor for the purpose of defrauding Ayres, or that the conveyance was not *bona fide*, the parties to the controversy might be changed, and Ayres, or any creditor of Gage, might be the real party to the controversy with the city and trustee; but there is nothing of the kind in this case. It therefore seems clear to me that, upon the facts shown in the record, this suit is not such an one as was intended to be removed from the state to the federal court.

The cause will therefore be remanded to the Superior Court of Cook county.

Witt, Assignee, vs. Hereth.

BENNETT F. WITT, ASSIGNEE OF WILLIAM M. AUGHINBAUGH, vs. HENRY HERETH *et al.*

DISTRICT COURT.—DISTRICT OF INDIANA.—OCTOBER, 1875.

1. **REDUCING DEMAND TO JUSTICE'S JURISDICTION.**—In Indiana, a plaintiff may reduce his demand to bring it within the jurisdiction of a justice of the peace.

2. **LIEN OF EXECUTION IN BANKRUPTCY.**—The lien of an execution will be respected by the bankruptcy court, though the plaintiff sued out his execution immediately upon the rendering of the judgment, and the defendant filed his bankruptcy on the same day. The creditor has a right to follow all the remedies which the law gives him.

On the 31st day of July, 1875, Henry Hereth filed his complaint before William H. Schmitts, a justice of the peace in and for Center township, Marion county, Indiana, demanding judgment against William M. Aughinbaugh for two hundred dollars upon a note, the principal of which was two hundred dollars and eighty-three cents, and on the same day a summons was duly issued to a constable of said township, and served on said Aughinbaugh. On the 3d day of August, at 9 o'clock A. M., that being the time at which said cause was set for trial, the said Aughinbaugh was duly called and defaulted, and judgment was entered for the plaintiff for two hundred dollars and costs of suit.

Subsequently, on said 3d day of August, the plaintiff filed his affidavit with said justice, averring that the collection of his judgment would be endangered by further delay in the issuing of execution. Thereupon an execution was issued on said judgment, which was immediately levied upon the goods and chattels of the said Aughinbaugh sufficient to satisfy the debt and costs. And later, on said day, the said Aughin-

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baugh filed his voluntary petition and was adjudged a bankrupt.

On this agreed statement of facts the court is asked to decide whether the lien of the execution and levy was displaced by the subsequent proceedings in bankruptcy.

Morrow, Trusler & Henry, for complainant.

Bixby & Norton, for defendants.

GRESHAM, J.—Justices of the peace in Indiana have jurisdiction to try and determine suits founded on contract, when the debt does not exceed two hundred dollars.¹

Unless otherwise directed, justices shall issue execution on all judgments, when the defendant has appeared, after the expiration of four days from the rendition thereof, and in cases of default after the expiration of ten days; but when it shall be made to appear by affidavit that delay will endanger the collection of the judgment, execution shall issue immediately.²

It is insisted that the justice had no jurisdiction to render the judgment, because the note sued on exceeded the sum of two hundred dollars, and that the statute did not allow the plaintiff to remit part of his claim so as to reduce it to two hundred dollars for the purpose of giving justice jurisdiction.

Even if it had appeared that the plaintiff had thus reduced his claim by remitting the interest and part of the principal, I would have no doubt on the question of jurisdiction.

The amount demanded determined the jurisdiction of the justice, and not the principal of the note or the amount actually due on it. If the plaintiff saw proper to reduce his claim to a sum within the jurisdiction of the justice by remit-

¹ 2 Gavin & Hord's, 579.

² 2 Gavin & Hord's, 600.

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the original manuscript, for representation in the United States.

Before February 1, 1875, Jackson, with the consent of D'Ennery and Cormon composed and arranged a translation from the French play into the English language, and entitled the translation "The Two Orphans," being a literal translation of "Les Deux Orphelines," and adapted his translation for performance and representation to English-speaking audiences.

February 1, 1875, by and with the consent of D'Ennery and Cormon, and before publication, Jackson obtained a copyright on his translation, as author, under the copyright laws of the United States.

Complainants afterwards became the sole owners and proprietors of the original manuscript in French, the translation by Jackson and his copyright, by purchase and assignment from Jackson.

Complainants alleged that the original "Les Deux Orphelines" had never been translated or published with the knowledge or consent of its authors, except the translation by Jackson; that defendants had announced and had on divers nights publicly performed, the "Two Orphans" at the Adelphi Theater in Chicago, without the consent and license of complainants; that defendant Rankin and his associates had previously, and while in the complainants' employ, performed and acted the "Two Orphans," and had thereby familiarized themselves with it, and were acting the same translation at the Adelphi.

Prayer for an injunction and accounting.

The bill was supported by several affidavits, among which were complainants' and Jackson's. The affidavits were sworn to in New York, but were not entitled of the suit or court until filed.

The affidavit of L. F. Post, one of complainants' counsel, was filed, showing these affidavits were made and sworn to for the purposes of this suit and for no other purpose.

The defendants denied that Jackson acquired any rights by

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An order will be entered requiring the assignee to pay said judgment and costs out of any funds in his hands not otherwise appropriated.

The same rule as to reduction of demand prevails in Illinois. *Raymond vs. Strobel*, 24 Illinois, 113; *Simpson vs. Updegraff*, 1 Scammon, 593; *Bates vs. Bulkley*, 2 Gilman, 389; *Korsoski vs. Foster*, 20 Illinois, 82; *Ellis vs. Snider*, Breese, 336.—[Reporter

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SHERIDAN SHOOK *et al.* vs. ARTHUR McKEE
RANKIN *et al.*

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—OCTOBER,
1875.

IN EQUITY.

1. COPYRIGHT—TRANSLATIONS OF PLAYS.—Where the translator of a play, by consent of the author, has obtained a copyright upon it, the owner of such copyright can maintain a bill enjoining any other person from using or representing such translation, or any part of it.

2. PRACTICE.—Affidavits, evidently intended to be used in a case, but not entitled in it, will be allowed to be read on motion for injunction.

Complainants' bill alleged that prior to February 1, 1875, a dramatic composition or play, entitled "Les Deux Orphelines," was designed and composed in the French language by Adolph D'Ennery and Eugene Cormon, residents and citizens of France. N. Hart Jackson, a resident of the United States, became the owner by purchase and assignment of

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this was done, he applied under the law for a copyright; and the question is whether there was any valid objection to his obtaining a copyright for the play, thus translated into English.

I do not see that there was. He was the translator of the play. He adapted it to representation on the stage, and was, in the sense of the law, the author of that for which he obtained a copyright. No one could complain of this, except the authors of the play in French, and it affirmatively appears that they assented to this action on the part of Mr. Jackson. Then I do not see why he was not protected under the law for his translation and adaptation of the work to the stage, and of which he was in one sense the author.

That being so, has the defendant infringed his rights by performing this unpublished drama? To decide that, it is only necessary to determine the effect to be given to sundry affidavits which have been introduced in the case—those of Mr. Shook, Mr. Palmer and Mr. Jackson. I think it is proper for the court to receive these affidavits for the purpose for which they were filed. It is well known that the courts are much more liberal upon this subject than they were in former times. They do not reject affidavits simply because there may be some clerical error or omission, provided it appears that they were intended for the case which the court is called upon to investigate.

It affirmatively appears, I think, that these affidavits were made for the purpose of being used in this case; and conceding that they did not at the time contain the proper title of the cause, still they were made and forwarded to counsel, who may be presumed to be authorized by the parties to give the proper character to them by stating the name of the cause in which they were to be used. It seems to me that it would be adopting a very rigid rule, and one hardly in accordance with the liberal practice of the present day, to declare that the affidavits should be rejected because at the time when the affidavits were made and signed by the parties, the name of the

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cause was not stated, provided they knew that they were to be used in the cause, although they did not know the technical description of the title of the same.

Then, these affidavits being received, as I think they should be, there can be no doubt that these defendants—the principal defendants who have performed this play—have been using the translation of Mr. Jackson, as adapted by him for representation on the stage.

They acquired their familiarity with it in consequence of the direct action of the translator or his assignees, and it would be hardly fair under the circumstances of the case that they should be permitted to go on and use it contrary to the wishes of the owners. It has been said that they do not propose to use it any longer; but in view of the facts the court cannot assume that they will not do so, or refuse an injunction on that ground. It is not controverted that these complainants are Jackson's assignees, and are entitled to all his rights. I do not think that, because Mr. Jackson, or, possibly, the complainants, may have been mistaken as to their legal rights, or as to the particular character annexed to their rights of property subsisting in this drama, the court should be prevented from acting in this case. The court will not go into a collateral issue upon this question of injunction. The only point is whether complainants have rights which have been violated by the defendants, and whether they are entitled to an injunction upon the facts as they are presented in the case.

I have no doubt that they are, and therefore an injunction will issue, restraining the defendants from performing the play, which has been translated from the French of D'Ennery and Cormon, by N. Hart Jackson, and adapted by him for representation on the stage, or any part thereof.

As to the romance of the "Two Orphans": It purports to be a story in narrative form, founded, as I suppose, upon the play of the "Two Orphans;" but, so far as I have been able to examine it, I do not see, even conceding that its publica-

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tion was made with the consent of the complainants, that it deprives them of the right to the play of the "Two Orphans," as translated by Mr. Jackson.

It would take much time for me to go through this story in detail, and compare it with the drama, which I have not had an opportunity of doing. But so far as I have looked at it, I think it does not deprive the complainants of a right to an injunction on that account.

As to the translations of the French play, I know there may be certain phrases which may be identical in them, as translated by Jackson and Oxenford. There are or may be the same translations of some French words; but, of course, the fact of there being identity of a few phrases does not make them one play as translated.

It always must be a question to be decided by comparison whether or not there is any essential part of the play taken as translated by Mr. Jackson. What I mean is, that they have no right to take any part of this, the work of Mr. Jackson, and use it.

So far as I can see, the translations are made by two distinct persons, and independent of each other. I do not, therefore, touch the Oxenford play in this decision at all.

The order will be that the defendants shall not use the whole or any part of Mr. Jackson's translation—the drama which he has translated and adapted for representation on the stage in this country.

As at present advised, I shall not enjoin the defendants from using Oxenford's translation.

The question of the right to use the Oxenford translation came up subsequently before Judge Drummond on a motion to attach McKee Rankin for contempt, and he decided that the defendants had the right to use that translation, but that they must be careful not to interpolate any phrases of Jackson's translation.

The consent of an author to publication abroad places him in the position of a foreign author, and is an abandonment of his rights under our statute. *Bousicault vs. Wood*, 2d Vol. of this Series, 89. The representation of a play upon the stage is not at common law a publication, nor is it

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a dedication to the public. *Crowe vs. Aiken*, Id., 208. The author's rights at common law have not been taken away or limited by any existing act of Congress. *Idem.*—[Reporter.

UNITED STATES *vs.* DISTILLERY No. TWENTY-EIGHT *et al.*

DISTRICT COURT.—DISTRICT OF INDIANA.—NOVEMBER, 1875

DISTILLERIES MAY BE COMPELLED TO BRING THEIR BOOKS INTO COURT.

1. ACT OF JUNE, 1874.—The act of June 22, 1874, does not apply exclusively to cases arising under the custom revenue laws, but applies as well to cases arising under the internal revenue laws.¹

2. CONSTITUTIONALITY OF ACT.—The fifth section of the act of June 22, 1874, is constitutional, and does not violate articles 4, 5 and 7, of the amendments to the Constitution.

3. PROCEEDING AGAINST DISTILLERY.—This is a proceeding against the distillery and not against the claimants; any statements made by them as witnesses in the proceeding against the distillery could not be used against them in any subsequent criminal prosecution.

4. PRODUCTION OF BOOKS.—The court had the power to make the order requiring the production of the books and papers, and to enforce it.

5. JURY TRIAL.—That when the issues are made up, the claimants will have the constitutional right to demand a jury trial.

6. THE PENALTY.—The penalty for not complying with the order to produce books is that the allegations in the motion shall be taken as confessed.

7. *EX POST FACTO* LAW.—The objection that the act of 1874 is an *ex post facto* law considered.

Informations were filed in two cases under the internal

¹ 18 U. S. Statutes at Large, 486.

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revenue laws against distillery No. twenty-eight, and certain rectifying houses and other property.

Gordon B. and John W. Bingham intervened as claimants and the causes were consolidated.

Subsequently, upon the written motion of the district attorney, under the fifth section of the act of June 22, 1874, an order was entered against the claimants to produce in court certain business books and papers relating to their business as distillers, rectifiers and wholesale liquor dealers, on a day and hour certain, subject to the examination of the district attorney, under the direction of the court. On the day named claimants appeared by counsel, and moved that this order be vacated for the following reasons:

1. That the act of June 22, 1874, applies exclusively to cases arising under the custom revenue laws, and not at all to proceedings under the internal revenue laws.¹

2. That the books and papers ordered to be produced are not described with sufficient particularity.

3. That the fifth section of the act of June 22, 1874, is unconstitutional in this, that it violates articles 4, 5 and 7 of the amendments to the Constitution.

Nelson Trusler, district attorney, *Charles L. Hostein* and *Thomas M. Browne*, for the United States.

James M. Shackelford and *Charles Denby*, for claimants.

GRESHAM, J.—The section under which the order was entered against the claimants reads as follows: "That in all suits and proceedings other than criminal, arising under any of the revenue laws of the United States, the attorney representing the government, whenever, in his belief, any business book, invoice, or paper, belonging to or under the control of the defendant or claimant, will tend to prove any allegation

¹ 18 U. S. Statutes at Large, 486.

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made by the United States, may make a written motion particularly describing such book, invoice, or paper, and setting forth the allegation which he expects to prove; and thereupon the court in which the suit or proceeding is pending may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice, or paper in court, at a day and hour to be specified in said notice, which, together with a copy of said motion, shall be served formally on the defendant or claimant by the United States marshal by delivering to him a certified copy thereof, or otherwise serving the same as original notices of suit in the same court are served; and if the defendant or claimant shall fail or refuse to produce such book, invoice, or paper, in obedience to such notice, the allegations stated in said motion shall be taken as confessed, unless his failure or refusal to produce the same shall be explained to the satisfaction of the court. And if produced, the said attorney shall be permitted, under the direction of the court, to make examination, (at which examination the defendant or claimant, or his agent, may be present,) of such entries in said book, invoice, or papers, as relate to or tend to prove the allegation aforesaid, and may offer the same in evidence on behalf of the United States. But the owner of the said books and papers, his agent or attorney, shall have subject to the order of the court, the custody of them, except pending their examination in court as aforesaid."

Language more general could hardly have been employed. It provides for the production of books, papers, etc., "in all suits and proceedings other than criminal, arising under any of the revenue laws of the United States."

It is true the act is entitled "An act to amend the custom revenue laws and to repeal moiety laws," and that, with the exception of the fifth section, its provisions relate solely to the customs-revenue. But it also appears that the provisions of the former acts, repealed by the act of 1874, also related exclusively to the customs-revenue. Why, then, did not Congress expressly limit the operation of this act, providing for

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the production of business books and papers to cases arising under the customs-revenue laws, as it did the provisions of the several acts referred to in this act and repealed by it! Clearly for the reason that in all suits other than criminal, arising under any of the revenue laws of the United States, Congress designed that the court might require the production of any business book and paper belonging to or under the control of the defendant or claimant.

Besides, it is seldom that the title of an act of Congress is resorted to as an aid in its construction. The title neither extends nor restrains any positive provisions contained in the body of the act. It is well known that Congress often embodies in a single act incongruous provisions, having no reference to the matters specified in the title.¹

The second objection made to producing the business books, papers, etc., is that the same were not described with sufficient particularity.

The act must receive a reasonable construction. Such a decree of particularity as was insisted upon by counsel for claimants would render the fifth section practically nugatory. The district attorney cannot be required in his motion to describe the business books as journal A or B, or ledger A or B, for he may not know what particular books the claimants have.

The description of the books and papers in the written motion, and the order of the court is, substantially: Certain day books, journals, cash books, ledgers, blotter-books, blotters, invoices, dray-tickets, etc., kept, received, and taken by the claimants in their business as distillers, rectifiers and wholesale liquor dealers, between certain dates named, and since the 22d day of June, 1874, showing the amount of spirits produced, received, removed, and sold by them during the time named. The claimants were sufficiently advised by this de-

¹ *Hadden vs. Collector, etc.*, 5 Wallace, 107.

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scription what books and papers were meant. No greater certainty of description was required to satisfy the statute.¹

In considering the constitutionality of the fifth section of the act of June 22, 1874, it is necessary to determine the real character of the case at bar.

The charges made in the libel are against the property and not against the claimants. It is the distillery and other property proceeded against that are treated as the offenders. The claimants, strictly speaking, are not parties to the proceeding. They are here of their own motion, and not on the process of the court. The judgment must be for or against the property libeled, not for or against the claimants. A forfeiture of the property does not convict the claimants. This proceeding is entirely independent of any criminal prosecutions which have been commenced, or which may hereafter be commenced against them. The books and papers, which may or may not, when produced, inculcate the property, can only be used in evidence in this action. After being thus used they go back into the possession of the claimants.

The question, therefore, of compelling a person to accuse himself or to testify against himself in a criminal case is not before the court. Even if the act of 1874 were not in existence, the claimants might be compelled by a subpoena *duces tecum*, to bring in the books and papers called for in the order of the court; and I can see no reason why they might not also be compelled to testify concerning all the allegations of the libel. Any statements thus made by them as witnesses in the proceeding against the distillery and other property could not be used against them in any subsequent criminal prosecution.

The act of February 25, 1868, section 860, Revised Statutes, provides that "no discovery or evidence obtained from

¹ *United States vs. Three Tons of Coal*, ante p. 379; *Myer vs. Becker*, 21 Internal Revenue Record, 244.

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the party or witness, by reason of a judicial proceeding * *

* * shall be given in evidence or in any manner used against him, or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture."

It was said in argument that under this statute the books and papers, even if produced, could not be used in evidence on the trial of this cause.

The act of 1874, expressly provides that the books and papers may be thus used in evidence. This is the last expression of the legislative will. So far as the two acts are inconsistent or repugnant, the act of 1868 are repealed. The claimants are not justified by article five of the amendments to the constitution in refusing to produce their books and papers to be used in evidence.¹

The claimants next attempted to shelter themselves under the provision in article four, of the amendments to the Constitution which secures the people in their persons, papers and effects, against unreasonable searches and seizures.

Congress is empowered by the Constitution "to levy and collect taxes, imports and excises," provided the laws are uniform in their operation. The mode and manner of exercising this power is left to the discretion of Congress. Under the exercise of that power Congress has provided the internal revenue system. By that system the government raises the principal portion of its revenue. The tax on the production and sale of spirits is a material source of revenue. The government has, therefore, practically assumed control of the manufacture and sale of spirits. It has adopted regulations for the government of distillers, rectifiers, and wholesale dealers, with fines, penalties, and forfeitures for their violation. They are required to keep books in which they are to enter

¹ *United States vs. Parker R. Mason*, ante p. 350; *United States vs. Three Tons of Coal*, ante p. 379.

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daily all their business transactions with the utmost particularity. These books are at all times open to the inspection of the proper revenue officers, and are popularly known as government books. If properly kept they will show the exact amount of spirits produced, received, and removed on any given day. If so kept, they will correspond with their business books, and this correspondence ought to exist. No one can engage in the manufacture and sale of spirits without the consent of the government. That consent is obtained on certain terms and conditions. No one can be allowed to say that, as a distiller, rectifier, or wholesale liquor dealer, he has kept a private record of his transactions. His books and entries are *quasi* public books and entries. The government has a right to see any record kept by him of his business. This right has been exercised by the government since its organization. The first and subsequent congresses have enacted such laws. It is too late to question the validity of such statutes. Experience has shown that without severe and even inquisitorial regulations the government cannot successfully collect the tax levied upon the production and sale of spirits, and the necessities of the government justify the existence and rigid enforcement of such regulations.

The order of the court complained of by the claimants authorizes neither search nor seizure. It calls on the claimants to produce certain books and papers relating to their business as distillers, rectifiers, and wholesale liquor dealers. If their business books and papers are not produced the allegations of the libel are taken as confessed.

The claimants were equally unsuccessful in invoking the protection of article seven of the amendments to the Constitution. That article provides that "in suits at common law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." And it has been settled that a proceeding *in rem* under the internal rev-

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venue laws is a suit at common law within the meaning of that article.¹

It is clear then that when the issues in this proceeding are made, and the case is ready for trial, the claimants will have a constitutional right to demand a jury.

But they must first submit to and comply with all reasonable and proper rules and orders of the court entered against them in making up the issues and preparing the case for final trial.

As already stated, the books and records kept by the claimants are *quasi* public records. If their government books were kept as the law required them to be kept, their business books will make the same showing as the government books. And if this correspondence exists, the production of their business books and papers will not harm the claimants. If their government books were not so kept, and their business books and papers contain evidence which will tend to prove the allegations in the libel, there is justice in the demand of the government for their production.

The act of 1874, authorized the court to make the order in controversy. That act, and others of the same nature, have not only been held constitutional, but reasonable and proper, in view of the object sought to be accomplished. The statute authorizing the order for the production of books and papers also fixes the penalty for disobedience of that order—the allegations in the motion shall be taken as confessed.

If Congress had not seen proper to prescribe the penalty or punishment for disobedience of the order, it can hardly be doubted that the courts, in the exercise of a sound discretion, would have been authorized to enforce compliance either by fine or imprisonment, or both. In this case the statute has fixed the penalty, and the court can inflict no other. If the claimants refuse to comply with the order of the court they

¹ The Sarah, 8 Wheaton, 391.

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are in contempt of its authority. That question is not triable by a jury. The contempt can be purged only by a compliance with the court's order. The constitutional right of the claimants to a trial by jury will not shield them from punishment for disobedience of the order of the court.

Whenever in the progress of a proceeding a party acts contumaciously by disobeying a lawful order entered against him, that proceeding, so far as he can claim any advantage under it, is at once arrested, and goes no further until the contempt is purged.

Where the United States courts are not limited by statute, their power to enforce obedience to their orders by punishing for contempt is discretionary.

The object to be accomplished by the exercise of this power may be punitive in its character, or it may be at once punitive and remedial, according to the given case.

In the case of *Texas vs. White*, in the Supreme Court of the United States, not yet reported, Justice Miller used this language:

"The exercise of this power has a twofold aspect, namely: First, the proper punishment of the guilty party for his disrespect of the authority of the court or its order; and second, to compel his performance of some act or duty required of him by the court, which he refuses to perform.¹ In the former case the court must judge for itself the nature and extent of the punishment with reference to the gravity of the offense. In the latter case the party refusing to obey should be fined and imprisoned until he performs the act required of him, or shows that it is not in his power to do it."

Also see Bishop's Criminal Law, sections 232 to 259, inclusive, 3d edition.

The first ten articles of the amendments to the Constitution were proposed by the first Congress of the United States at

¹ *Stimpeon vs. Putnam*, 41 Vermont, 228.

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its first session on the 25th day of September, 1789. At the same session, and about the same time, the act commonly called the judiciary act was passed. Section fifteen of that act (section 724, R. S., 137) is as follows:

"In the trial of actions at law, the courts of the United may, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery; and if a plaintiff shall fail to comply with such order, to produce books or writings, it shall be lawful for the courts respectively, on motion, to give the like judgment for the defendant as in cases of non-suit; and if a defendant shall fail to comply with such order to produce books or writings, it shall be lawful for the courts respectively, on motion as aforesaid, to give judgment against him or her by default."

In the case of *U. S. vs. Twenty-eight Packages Pins*, Gilpins Reports, 306, it was held that this statute did not apply to proceedings *in rem*. The contrary, however, was held by Judge Treat, of the Eastern District of Missouri, in the case of the *U. S. vs. Four hundred and sixty-nine Barrels of Spirits*, 10 Internal Revenue Reports, 205, in which ruling he says he is supported by the circuit judge in a well-considered opinion. This section of the judiciary act is important as a legislative construction of the seventh article of the amendments to the Constitution. The very act organizing the federal courts is contemporaneous with the articles of the amendments to the Constitution, whose protection was relied on by the counsel for the claimants with such seeming confidence. The act is still in force. It authorizes the courts to order the production of the books and writings of a party, and to enforce such order by summary judgment against the party failing or refusing it. The motion in the case at bar was made under the act of 1874, and not under that of 1789;

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but the argument by which the former statute is sustained necessarily establishes the validity of the latter. The further point was made by counsel for the claimants that the fifth section of the act of June 22, 1874, was *ex post facto*, and, therefore null and void. In support of that position the case of *U. S. vs. Hughes*, 2 N. S. American Law Times Reports, 300, was cited.

That was a case pending before the passage of the act of 1874. It was a suit to recover penalties for an alleged violation of the revenue laws, committed prior to the enactment of the law of 1874. The motion in the case involved the production of books and papers of the defendant used and kept by him prior to the act of 1874. Judge Blatchford held, that as applied to that case, the act of 1874 was *ex post facto*, in that it altered the legal rules of evidence which applied prior thereto and at the time of the alleged violation. This case is expressly limited to the books, papers, etc., of the claimants, relating to their business since the act of June 22, 1874. Whether or not a statute is *ex post facto*, depends upon the facts of the particular case.

The court has been aided in the consideration of these questions by the labors of the counsel upon both sides, and especially by those of Mr. Holstein, the assistant district attorney.

The motion of counsel for claimants is overruled, and the order of the court requiring the production of the business books, papers, etc., will stand.

Calkins vs. Bertraud.

MARTIN T. CALKINS vs. THEOPHILUS T. BER-
TRAUD *et al.*

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—DECEM-
BER, 1875.

1. RE-ISSUE—EXTENDING CLAIM. — Under the patent laws from 1836 to 1861, a patentee can claim in a re-issue whatever clearly appears to have been a part of his original invention as then shown or described, either by his drawings, specifications or models.

2. The locating the joint forward of the evener in a cultivator beam, is a patentable feature, as it produces new and useful results.

3. Julius Gerber's re-issue of April 26, 1870, for "improvement in cultivators," original patent granted April 24, 1860, construed and held valid.

4. CERTAINTY IN CLAIM FOR PATENT,—need only be such as will enable a person of skill who understands the result to be attained, to construct a machine embodying the principle.

S. A. Goodwin and *G. W. Ford*, for complainant.

West & Bond, for defendants.

BLODGETT, J.—This is a bill in equity for gains, profits and damages, and final injunction against the defendants for an alleged infringement of a re-issued patent "for an improvement in cultivators," granted to Julius Gerber, April 26, 1870, upon the original patent issued to Irnlus R. Smith, dated April 24, 1860.

The answer denies that Smith was the first inventor of the improvement described and claimed in the original Smith patent, and as re-issued, and also insists that the re-issued patent is not for the same invention as that described in the original patent. The defendants also deny that they infringed the plaintiff's patent, even if its validity is conceded or established.

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The drawings attached to the original Smith patent showed a cultivator frame mounted on wheels and fastened to the tongue at a point forward of the evener.

This frame worked freely above the axle, the axle gauging the depth which the shovels could run into the ground. The claim was for the combination of this frame as constructed, with the wheels and tongue by the joint "M," as shown and specified. In the re-issue to the complainant Gerber, he was allowed to amend his specifications in several particulars, the most material of which is, that "the auxiliary frame is hinged or otherwise loosely attached to the main frame at a point between the evener and the neck yoke, by means of which great length of beam is obtained, and more purchase in the side motion." * * * "By means of the long swing obtained by bringing the beam of the auxiliary frame forward of the evener, the difference between the movements of the front and rear shovels is rendered relatively less."

His general claim in 1860, was for the idea of mounting this cultivator frame upon wheels, so that the operator could ride upon the wagon frame without his weight resting upon the cultivator frame, and operate the cultivator frame from his seat or platform. The patent was for the combination of the cultivator frame and the wagon frame together, connecting them by the joint "M." He did not seem to realize that there was any very special merit in bringing the beam forward to the point where he coupled it to the tongue; at least he makes no mention of it in his specification, as a novel or useful element in his machine. It was, however, found by experience that this cultivator, by reason of the long swing which it had in its beam, was much more readily manipulated and handled than any other which had been produced, and therefore the cultivator seems to have come into somewhat general use, and finally the owners of the patent surrendered it, and obtained a re-issue covering, as a specific device, this idea of coupling the beam forward of the evener so as to secure a long swing as the essential element in the invention.

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The claim of the re-issued patent is as follows: "*First*, an auxiliary frame carrying two or more shovel standards on each side as shown, when said frame is hinged to the pole between the evener and neck-yoke, as described, for the purposes set forth."

There is no doubt but that Smith's original model shows that he hinged his plow-beam forward of the evener. The joint is shown in the original model, and it is also shown in the drawings. And Gerber, therefore, had the right, as the assignee of Smith's patent, to cover that feature of the Smith invention by the re-issued letters-patent. And it seems, too, that the Patent Office took the same view of the matter, and gave him what he claimed.

This re-issue was made on the 26th of April, 1870, and while the patent office was acting under the law of 1836, as amended up to the act of 1861, so far as related to the matter of re-issues. This law has been construed to authorize a patentee to claim on a re-issue whatever shall clearly appear to have been a part of his original invention as described or shown in his original specifications, drawings or models. There are ample authorities upon that point construing the act of 1836, with amendments up to 1861 in that regard, and giving the inventor the right to a re-issue where the new claim is clearly justified by his drawings or specifications or models, or either, and allowing him to amend his specifications if necessary, so as to cover more fully what, upon experience, has proven to be a meritorious part of his invention.¹

It seems clear from the proofs in this case that as wheel cultivators came into use, the value of the long swing to the beams, in the practical working of the machine, became more apparent, and hence the owners of the Smith patent sought

¹ *Battin vs. Taggart*, 17 Howard, 74; *Gallahus vs. Butterfield*, 10 Blatchford, 232; *Wheeler vs. Clippier Co.*, 6 Fisher, 1; *Seymour vs. Osborne*, 11 Wallace, 544.

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and obtained this re-issue for the purpose of covering this special feature in the original Smith machine.

The defendants contend that the re-issued patent is void because the distinguishing feature, the location of the joint forward of the evener, is not patentable. They urge that hinging forward of the evener instead of back of it, produces no new result; that no definite point is fixed and no directions given as to the point where the joint is to be placed. The evidence, however, seems to me to show that the "long swing," obtained by the hinging of the beam forward of the evener, is a new and useful result.

The machines of Ganse and Whitehall, shown in the proofs, which ante-date the Smith patent, show the shovel-beams hinged back of the evener, producing a jerky motion and rendering it almost, if not wholly, impossible to guide the shovels so as to avoid hills out of line, or stones, roots or other obstacles in the direct line.

The suggestion that this is not a change of result, but is only a change in degree, is, I think, not sustained by the proof. The long radius, in other words, secures a practicable cultivator which can be guided along the side of a crooked row of plants so as to avoid disturbing them, while the short beams would seem to be practically useless except in straight, or nearly straight, rows. This is a practically new result and the proper subject of a patent as such. The objection that the first claim of the patent is void for uncertainty, because the precise location of the joint is not described or fixed in feet or inches, seems to me untenable. The amended specifications say:

"This auxiliary frame is hinged, or otherwise loosely attached to the main frame at a point between the evener and neck-yoke, by means of which great length of beam is obtained and more purchase in the side motion."

* * * * *

"When two shovels are employed upon each side of the auxiliary frame, the rear set are necessarily wider apart than the

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front set, and as they swing in the arc of a larger circle, they move relatively over more ground.

"In the ordinary cultivator, this difference of relative movement is quite marked, and consequently there is danger, when the front shovels are swung aside to avoid irregularly planted hills, of the rear shovels interfering with the wheels or the adjacent rows.

"By means, however, of the long swing obtained by bringing the beam of the auxiliary frame forward of the eveners, the difference between the movements of the front and rear shovels is rendered relatively less, and the difficulty referred to obviated."

* * * * *

"The easy but limited side motion of the auxiliary frame enables the driver to so control its action as to cultivate with safety those crops which have been irregularly planted, or which may have come up in other than straight lines."

Here the direction is to make the swing long enough to secure the desired result, and enables a person of skill who understands the result to be attained, to construct a machine embodying the principle, and this is all the certainty required by law.

So that when you consider these specifications, together with the idea that the end to be obtained is the "long swing," it seems to me there is sufficient in the specifications to notify a party who attempts to construct a cultivator as to the length of beam to be adopted. It does not say that the joint "M" shall be three feet six inches or five feet six inches forward of the eveners, or that it shall be eight feet back of the point where the neck-yoke connects, but it says it shall be far enough forward to secure that easy motion, and that long radius which will secure ease of handling, and not bring the rear shovels in contact with the wheels, while it will move the forward shovels far enough to avoid the hills out of line or any inequality in the surface of the ground, such as a root or a stone, or a stump.

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The next point made by the defendants is, that the complainant's machine is constructed upon a different principle than that of a swinging machine; that it is intended to act by a rocking and not by a swinging motion. There seems no doubt that the original Smith machine was intended to rock upon the saddle "P," but provision was also made for swinging, that is, there is play enough between the ploughs and the frame "O" to allow of a swing or side motion.

Now, I think there is no doubt, from the proof, that Mr. Smith, in his original patent, intended to not only swing his cultivator frame, but that he also intended to avoid small obstructions by rocking the plough beam upon this pivoted point, this saddle; and any one at all familiar with ploughing knows that a plough is very readily guided by rocking, that is, by tipping the top a little to the right or left. Now, the least tipping of a plough, we all know, causes the plough to run, as the ploughmen say, "to" or "from the land" and the tipping or the rocking of this frame, so that one set of shovels shall run deeper into the ground than the other, would, of course, cause the frame itself to swing to the side, because it would increase the draft on one side and relieve it on the other. So that the rocking motion of itself would cause the swinging motion. The moment that you rock the shovel enough to secure inequality in the hold upon the ground upon one side more than the other, you would of course produce a swinging motion if your plough was moving forward in straight lines, and undoubtedly this was one of the ideas in the mind of this inventor.

While the rocking motion is provided for in the original patent, nothing is said about it in the re-issued patent, and I can see no reason why the complainant is not at liberty to hang or suspend his auxiliary frame under the axle as well as to mount it on or over the axle. This point is not raised in the case, and I do not intend to decide it. Certainly the complainant leaves himself at liberty to rock or swing his shovels,

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or to do both, as shall be deemed best in practice, by means of the joint "M" between the evener and the neck-yoke.

Now upon the question of infringement: I do not see that there can be any doubt that if Smith was the first to invent the "long swing," to be secured by jointing the beam to the pole between the evener and the neck-yoke, and is entitled to a patent for the idea, then the defendant's machine infringes the complainant's in this particular.

I have here a model of the defendant's machine which has the plough beam jointed to the pole between the evener and neck-yoke and suspended under the axle, and operated by means of handles, the driver being seated upon a seat which is but an extension of the tongue or pole to the rear of the axle. Here we have provision for the long swing by the joint between the evener and the neck-yoke, and the essential element of the complainant's device is manifestly in defendant's machine.

Both machines are limited in their side motion by the wheels, and the wheels must necessarily be so near together as to run freely between two rows, straddling one.

I therefore come to the conclusion that the re-issue by which Gerber, as the assignee of the Smith patent, was allowed to amend his specifications so as to secure the joint "M" as an element in his device or in the Smith device, and to cover the idea of jointing between the evener and the neck-yoke as a specific element in his invention, is a valid re-issue under the patent law as it then stood; and that having obtained the re-issue and covering now the ground occupied by the defendants, the complainant is entitled to recover.

It will be necessary to make a reference in this case, unless counsel agree upon the matter of damages.

Decree for complainant.

United States vs. Dewey.

UNITED STATES vs. NELSON DEWEY.

DISTRICT COURT.—WESTERN DISTRICT OF WISCONSIN.—JANUARY, 1876.

PLEA OF JUDGMENT IN ANOTHER STATE.—It is a good plea that since the commencement of a suit, judgment was recovered between the same parties in another federal court upon the same cause of action. It is immaterial which suit was first commenced.

This was an action brought to recover the sum of \$6,215 of the defendant, as one of the sureties of George W. Gaffitt and James J. Dewey, upon a bond given by them to the United States, on the 7th day of January, 1868, as manufacturers of friction matches, etc., conditioned to pay for all revenue stamps that might be needed by them from the commissioner of internal revenue, from time to time, according to law. There were two other sureties upon the bond, who reside in New York, where the principals also reside.

It is now shown that prior to the commencement of this suit, a suit was prosecuted by the United States, in the district court for the Southern District of New York, against all the parties to the bond, but that service was not made on Dewey, as he was a resident of this state, but that after this suit was at issue, he voluntarily appeared in that suit, and thus gave that court jurisdiction over him.

It further appears by the affidavit of defendant, filed on this motion, that on the 7th day of December, 1875, judgment was obtained against all of the defendants therein, including himself, for the amount claimed as due upon the bond.

Upon this state of facts, the defendant, when the case was called for trial, moved for leave to file a plea setting up these

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facts, by a plea *puis darrein continuance*, as a bar to the further prosecution of this action.

H. M. Lewis, U. S. District Attorney, for the United States.

Gregory & Pinney, for defendant.

HOPKINS, J.—I was not cited, nor have I been able to find a decision of the federal courts upon this question, or whether the pendency of a suit in one district may be plead in abatement to a suit in another district of the federal courts.

I find that the decisions of the United States circuit courts are not in accord upon the right to plead the pendency of a suit for the same cause of action in the state courts in abatement to suits prosecuted afterwards in the United States courts, although I think the weight of authority in those courts is in favor of the right, particularly when the suit is pending in the same state with such courts.

Judge Love, in *Brooks vs. Mills County*, 2 Central Law Journal, 719, has examined and collected the authorities sustaining this view with great industry.

Justice Clifford, in *Lowring vs. Marsh*, 2 Clifford, 322, says, however, that the rule has always been that such a plea was not good in the first circuit, but in this circuit it has been the other way.¹

The question has never been decided by the Supreme Court of the United States. I must say I do not see any satisfactory reason for denying the plea in abatement of suits pending in the courts of other states. Multiplicity of litigation is vexatious, and should be discouraged, and only when necessary should any suit be sustained, and when a party sues in one jurisdiction, I do not see why he should be allowed to sue

¹ *Earl vs. Raymond et al*, 4 McLean, 233.

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at the same time in another, for the same cause of action. On that point I concur with the intimation of the court in 30 Vermont, 538, hereafter cited.

But it may not be necessary to decide that question in this case, for here it is alleged that there has been a recovery for the same cause of action. If so, it is a merger, and no recovery can be had in any other court, state or federal, upon the same cause of action. This is too well settled to be questioned.¹

In this case it appears that as to this defendant this court first got jurisdiction, so that the suit in New York could not for that reason have been plead in abatement to this suit, hence the question whether a plea of a suit pending in another district for the same cause is immaterial to consider on this motion.

The matter proposed to be set up does not go to the form of the remedy, but to the right to maintain the action at all. It shows that the cause of action is gone—is merged in a judgment,—and therefore, no longer in a legal sense exists.²

This is the rule prevailing in regard to suits prosecuted in different states at the same time. The pendency of the one first commenced cannot be plead in abatement to another subsequently prosecuted in another state, but a judgment in either without reference to the question as to which was commenced first, may be plead in bar to the other.³

This doctrine is held to necessarily result from the provision in the Constitution of the United States, that the judicial proceedings of each state shall have like effect in every state

¹ *Mason vs. Eldred*, 6 Wallace, 281; *Eldred vs. Bank*, 17 Wallace, 545; Freeman on Judgments, Sec. 186.

² *Nicholl vs. Mason et al.*, 21 Wendell, 839.

³ *Bank of the United States vs. Bank of Baltimore*, 7 Gill, 415; *Bank of North America vs. Wheeler*, 28 Connecticut, 483; *McGillray vs. Avery*, 30 Vermont, 538; *Rogers vs. Odell*, 39 New Hampshire, 452; 1 Chitty's Pleadings, 454.

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as in the state where they were taken. But I think the effect given to judgments of courts of competent jurisdiction, by the common law, would lead to the same conclusion.

As the defendant appeared in that case, the judgment therein extinguished the cause of action. But there does not seem to be any advantage accruing to the United States by prosecuting this suit to judgment, for an execution issued upon the judgment obtained in the southern district of New York, may run into and be executed in this state as well as if issued from this court,¹ so that the reason for admitting that judgment as a bar to this suit is much stronger than in a case between private parties, where executions are confined to the states where judgment is recovered.

The motion of the defendant is therefore granted.

¹ Section 936, U. S. Revised Statutes.

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THE NORTH CAPE.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JANUARY, 1876.

1. CITY TAX AGAINST VESSEL NOT DUTY OF TONNAGE.—The assessment of a vessel owned in a city, by the city assessor, for city taxes is not a 'duty of tonnage' within the meaning of the United States Constitution, Article I., §10, first clause.

2. JURISDICTION OF ADMIRALTY.—A court of admiralty has jurisdiction to try the question of unlawful seizure of maritime property for taxes or duties.

3. ASSESSMENT AGAINST VESSEL BY NAME.—It is not a valid objection that the assessment and warrant are against the vessel by name and not against the owner.

4. WHAT CONSTITUTES VALID ASSESSMENT AND WARRANT.—The owner not having listed the vessel for taxation as required by law, an assessment by the assessor, showing the name of the apparent owner, the description of the property, and its valuation, is sufficient to found a legal warrant. It is too late for the owner to object after the warrant has been issued.

5. SECRET OWNERSHIP.—An assessor is not required to look into the secret ownership of personal property, but may assess it against the apparent owner by possession or muniment of title.

This was a libel by Jacob Johnson and others against the schooner North Cape, George Von Hollen and the City of Chicago, for possession of the schooner North Cape. The admitted facts are that said schooner was on the 1st day of May, 1874, owned by the libellants, Jacob Johnson, Spier Amundson, and Nels Peterson—Johnson owning one-half, and the others each a quarter interest—Johnson and Amundson residing in this city, and Peterson at Lake View. Said vessel was registered, enrolled, and licensed under the laws of the United States in the office of the collector of the port of Chicago, in the name of Johnson, as owner, and was engaged at

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and since that time in the business of commerce upon the navigable waters of the United States, between the port of Chicago and ports of other states, being a vessel of over twenty tons burden. Between the 1st of May and the 1st of July, in the year 1874, said vessel was assessed by the assessor of the city of Chicago at the valuation of \$7,000, said assessment being entered on the assessment book in the following form:

"A complete list of all the taxable personal property of the South Division of the city of Chicago, Ill., according to the assessment roll, as returned or revised by the board of assessors for the year 1874."

LIST OF VESSELS REGISTERED IN THIS DISTRICT AND NOT RETURNED.

<i>Name of Vessel.</i>	<i>Name of Owner.</i>	<i>Valuation.</i>	<i>Tax.</i>
North Cape.	Jacob Johnson.	\$7,000

By an ordinance duly passed by the common council of the city of Chicago, on the 9th day of November, 1874, a tax of eighteen mills on the dollar was levied and assessed for the fiscal year 1874, on all real and personal property in said city, at the valuation thereof shown by the assessment for that year as made by the city assessor. And on the 9th day of December, 1874, a warrant was issued to George Von Hollen, collector of said city, authorizing and directing him to collect said tax. The warrant was in the same form as the assessment as far as regards the description of the schooner and name of owner and her valuation, with an additional column in which the tax was carried out and fixed at \$126, which is eighteen mills on her valuation. The warrant was in the usual form and directed the collector to collect the taxes assessed from the persons and property against whom the same was assessed. This tax remaining unpaid, the collector, on the 13th of September, 1875, levied upon and took possession of said schooner under the assumed authority of his said warrant, and held the same by virtue of said levy at the time of the

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filing of the libel in this case. It was also admitted that the practice of the city assessor in making assessments upon vessel property has been and is to assess the same to the owner or owners with their other personal property when the owners list or return the same to the assessor, but when the owners fail to return or list their vessel property, the vessel is assessed by name in the name of her owner as appears by the register in the office of the United States collector of customs of the port of Chicago.

Magee, Oleson & Adkinson, for libellants.

Francis Adams, Assistant Corporation Counsel, and *John C. Richberg*, for respondents, the collector and city of Chicago.

BLODGETT, J.—It is claimed by the libellants that the levy upon this vessel was void:

First—Because this is a “duty of tonnage,” within the meaning of the third clause of section 10 of the first article of the Constitution of the United States.

Second—Because said assessment and warrant for the collection of said tax are void, for the reason that the assessment is against the vessel itself by name, and the warrant runs against the vessel and not against the owner.

On the part of the respondents, Von Hollen and the city of Chicago, it is urged, by way of demurrer to the libel, that a court of admiralty has no jurisdiction in the case made by the libel and facts in this case, and that the only remedy is to be found in the courts of law.

I do not find that this precise question of jurisdiction has ever been raised and passed upon by the courts of this country or England. At least neither my own examination nor the industry of counsel has discovered any direct authority bearing upon the question. Upon general principles, however, I am of opinion that admiralty has jurisdiction in a case of unlawful

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seizure of maritime property for taxes or duties. Kent says: "The admiralty possesses authority to decree restitution of a ship unlawfully withheld by a wrong-doer from the real owner. In cases of illegal captures, and of bottomry, salvage, and marine torts, the admiralty courts in this country inquire into and decide on the rights and titles involved in the controversy."¹ And the student of this branch of the law well knows that the tendency has been to enlarge the sphere of admiralty jurisdiction rather than to restrict it since Chancellor Kent's time. Admiralty has jurisdiction of all torts upon and injuries to maritime property committed on navigable waters, when actions of trespass on the case would lie if committed upon land on other classes of property.² So, too, Mr. Justice Story enumerates the following classes of cases as unquestionably falling within the jurisdiction of the admiralty courts, viz.: "Assaults and other personal injuries; cases of collisions, or running of ships against each other; cases of spoliation and damage (as they are technically called), such as illegal seizures, or depredations upon property; cases of illegal dispossession, or withholding possession from the owners of ships, commonly called possessory suits; cases of seizures under municipal authority for supposed breaches of revenue or other prohibitory laws; and cases of salvage."³ In the case of the *Schooner Tilton*, 5 Mason, 465, it was said by the same learned authority, that suits in admiralty, touching property in ships, are either petitory suits, in which the mere title to the property is litigated and sought to be enforced, or they are possessory suits, to restore the owner to the possession. The same point was held by the same learned judge in *De Lorio vs. Boit*, 2 Gallison, 398, 470. And it is a fundamen-

¹ 1 Kent, 371.

² *Philadelphia, Wilmington & Baltimore R. R. Co. vs. Philadelphia & Havre de Grace Steam Towboat Co.*, 23 Howard, 209; *Waring vs. Clark*, 5 do., 441-464.

³ 8 Story's Commentaries on Constitution, 580, § 1663.

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tal principle that admiralty has jurisdiction of petitory and possessory actions to recover ships when replevin would lie at common law.¹

Concluding, then, that this is a proper case for admiralty jurisdiction, the question is: Does the case made entitle the libellants to the relief prayed, or to any relief in the premises? The first point made by the libellants is, that the tax in question is a "duty of tonnage" laid specifically upon this vessel by the city of Chicago, and as such void, because not laid with the assent of Congress.

What is the "duty of tonnage" meant to be prohibited by the Constitution of the United States? It is a well known historical fact that nearly all European states and divers free cities and ports were in the habit of levying a tax upon all vessels entering their ports, in proportion to their tonnage. And this was what was known to the maritime and commercial world at the time of the adoption of the Constitution as tonnage-tax, or duty of tonnage. The intention of the framers of the Constitution was not only to make commerce free between the states, but to prohibit the states from in any manner, of their own will or caprice, interfering with foreign commerce. A tonnage-tax is defined to be "a duty levied on a vessel according to the tonnage or capacity, without reference to where her owner resides. It is a tax upon the boat as an instrument of navigation, and not a tax upon the property of a citizen of the state." The duty of tonnage which the Constitution of the United States prohibited the states from levying is any duty or tax on a ship, as such, without regard to the residence of her owner, whether it be a fixed sum upon its whole tonnage or a sum to be ascertained by comparing the amount of tonnage with the rate of duty, when a ship, as an instrument of commerce, is required to pay a duty as a condition to her being allowed to enter or depart from a port, or load or unload a

¹ Benedict's Admiralty, 164, section 275.

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cargo, either upon her tonnage, her property, or as a license to her officers or crew.¹ This tax does not purport to be levied upon this vessel according to her tonnage, but according to her valuation as property. It is a tax upon this ship as part of the taxable property of the city of Chicago, she being owned and registered here. This tax is not, like a tonnage-tax, imposed upon the ship as such for the privilege of trading or taking shelter in this port, but treats the ship as property subject to a tax in this city.

The question of the liability of property in boats and vessels to be taxed by the state authorities, on valuation, as other property of the state is taxed, has been frequently discussed by the Supreme Court of the United States, and the power uniformly conceded.

In the *Passenger Cases*, 7 Howard, 402, the court said: "A state cannot regulate foreign commerce, but it may do many things which more or less affect it. It may tax a ship or other vessel used in commerce, the same as other property owned by its citizens." So in *The State Tonnage Cases*, 12 Wallace, 212, the court said: "But ships and vessels owned by individuals, and belonging to the commercial marine, are regarded as the private property of their owners, and not as the instruments or means of the federal government, and as such, when viewed as property, they are plainly within the taxing power of the states, as they are not withdrawn from the operation of that power by any express or implied prohibition contained in the federal Constitution. Argument, therefore, to show that they may be taxed as other property belonging to the citizens of the state is hardly necessary, as the opposite theory is indefensible in principle, contrary to the generally received opinion, and is wholly unsupported by any judicial determination. Direct adjudication to support that proposition is not to be

¹ *Gibbons vs. Ogden*, 9 Wheaton, 1; *The Passenger Cases*, 7 Howard, 288, 459; *Steamship Company vs. Port Wardens*, 6 Wallace, 31; *State Tonnage Tax Cases*, 12 do., 204, 212.

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found in the reported decisions of this court, but there are several cases which concede that such a tax, if levied by a state, would be legal, and no doubt is entertained that the concession is properly made."

"Taxes levied by a state upon ships and vessels owned by the citizens of the state, as property, based on a valuation of the same as property, are not within the prohibition of the Constitution, but it is equally clear and undeniable that taxes levied by a state upon ships and vessels as instruments of commerce and navigation are within that clause of the instrument which prohibits the states from levying any duty of tonnage without the consent of Congress; and it makes no difference whether the ships or vessels taxed belong to the citizens of the state which levies the tax or the citizens of another state, as the prohibition is general, withdrawing altogether from the states the power to lay any duty of tonnage under any circumstances, without the consent of Congress.

"Annual taxes upon property in ships and vessels are continually laid, and their validity was never doubted or called in question, but if the states, without the consent of Congress, tax ships or vessels as instruments of commerce, by a tonnage duty, or indirectly, by imposing the tax upon the master or crew, they assume a jurisdiction which they do not possess, as every such act falls directly within the prohibition of the Constitution.

"Prior to the adoption of the Constitution the states attempted to regulate commerce, and they also levied duties on imports and exports, and duties of tonnage, and it was the embarrassment growing out of such regulations and conflicting obligations which mainly led to the abandonment of the confederation and to the more perfect union under the present Constitution."

In the light of these authorities I therefore conclude that this tax is not a "duty of tonnage."

I come now for a moment to consider the second objection to this seizure, on the ground that this assessment and warrant

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are against the ship and not against the owner, and for that reason void. It was conceded on the hearing that ships and vessels are personal property, and such all the authorities define them to be. The law in this state in force at the time this assessment was made required the owners of all personal property to return each year to the assessor a schedule or list of all their personal property subject to taxation, by a certain day, to be fixed by the assessor, and it was the duty of the assessor to fix the fair cash value thereof.¹ The twenty-fifth section of chapter 120 prescribed the form of the schedule, and required, among other things, that it should distinctly set forth in the seventeenth item "every steamboat, sailing vessel, wharf-boat, barge, or other water-craft," etc. And by the thirteenth section of the same chapter it was provided that "All persons, companies, and corporations in this state, owning steamboats, sailing vessels, wharf-boats, barges, and other sailing craft, shall be required to list the same for assessment and taxation in the county, town, city, village, or district in which the same may belong or be enrolled, registered, or licensed, or kept when not enrolled, registered, or licensed."

Here is a plain and palpable duty imposed by law upon the owner of vessel property. It was admitted on the hearing that, between the 1st of May and 1st of July, 1874, a notice was sent to, or served upon the owners of all vessels, as shown by the register of the port, requiring them to list their property as required by law. It is not contended that the interest of these libellants, or either of them, was scheduled in any list of taxable property returned by them or either of them to the assessor. In fact, it is admitted that the only tax assessed upon or against this property is the one now in question. Undoubtedly this vessel, being personal property, should be taxed against some owner. The general theory of our law

¹ Illinois Revised Statutes, 1874, chapter 120, § 24; Illinois Revised Statutes, 1874, chapter 24, §§ 249, 251, 252, 253.

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does not allow of the assessment of the tax on personal property as an independent *res* or thing, as it may be assessed on real estate under certain circumstances, although there are some features of our later revenue laws which seem to point to the idea that the legislature intended, even in regard to some classes of personal property, like bank shares, capital stock, and vessel property, to tax the thing itself without regard to any personal liability of an owner. But, notwithstanding these incongruities, the general principle running through our law, as it now stands and stood at the time the tax was levied, required the owner of vessel property to list it as personal property for taxation where it was subject to taxation, either by virtue of his residence or the enrollment and registration of the property. It is not necessary that I should decide what would be the duty of the owner of a vessel residing at one place when his vessel is enrolled or registered in another tax district, as it is not claimed that these owners, or either of them, were taxed elsewhere for this vessel, and it is admitted that two of the owners, representing three-fourths of the property, resided in Chicago, and the vessel was registered or enrolled as owned by libellant, Jacob Johnson. Here it is admitted that the owners of this property made no returns of it to the assessor, and the assessor assessed it in the form and manner I have indicated. The assessment and warrant show the name of the vessel and the name of her registered owner, her valuation, and the tax; nor does it appear that Johnson or either of the other libellants made any return of other personal property. The position is, that this is a tax against the vessel, as such by her name—an assessment and warrant *in rem*, so to speak—instead of an assessment against her owners.

But I differ with the proctors for libellants as to the construction and effect to be given this assessment and warrant. True, the owners might have returned their interest in this vessel in their list of personal property, and if they had done so it should and would have gone into their personal property assessment; but they neglected to do this, and left the asses-

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sor to search out this property, fix its ownership, and assess its value as best he could. The assessor has made an assessment in which the name of the owner, the description of the property, and its valuation, all appear. What more is requisite? and what else could the assessor have done under the circumstances? The warrant, like the assessment, shows the name of the owner, the description of the property, its value, and the amount of the tax. I know of no other legal requisites for a tax warrant; nor does it make any difference, in my estimation, that the description of the property is in the first column to the left hand, and the name of the owner in the second. It seems sufficient if these facts appear on the face of the paper.

This may have been, and, for aught that appears in this case, was, the only property for which Jacob Johnson was taxed in the year 1874. If his property was valued too high, or if he was taxed as sole owner of a piece of property when he was only part owner, the law provides a way in which he could by attending to it in apt time have had the assessment corrected; but it does not lie in his mouth, after neglecting his duty in regard to listing his property, and after allowing the time to pass within which the assessment, as made by the assessor, stood open for correction, to object to the assessment in these particulars; when it was his obvious duty to have made it right in the first instance or had it corrected in proper time.

The policy of our law is that all property shall bear its equal share of the burdens of the state and city government. A court of admiralty is essentially a court of equity, and unless the libellant shows that some plain legal or equitable right has been violated, or is in danger of being violated, relief will not be given in this court. This vessel was subject to taxation by the city of Chicago. She was registered in the name of Jacob Johnson, who was a resident of this city. He must, for the purposes of taxation, be presumed to be the sole owner. It is possible that if Johnson had, while the assessment was subject to correction, appeared before the proper

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tribunal and shown that he was only half owner, and asked to have the assessment corrected in that particular, it might have been done. But he failed to do this, and there is enough, as I think, upon the face of the assessment and warrant and upon the admitted facts, to show that the tax was properly assessed.

It may be said that Peterson, one of the libellants, and owner of a quarter interest in the property, did not reside in the city of Chicago, but resided at Lake View, and, therefore, his interest could only be taxed where he resided. My answer to that is, that Johnson appeared to be the sole owner of record, and officers charged with the assessment and collection of taxes are not required to look into the secret ownership of personal property. They do their duty when they assess the property against the apparent owners, as shown by possession or muniment of title. Take, for instance, a large wholesale or manufacturing firm in this city. There may be silent partners residing elsewhere, who have an interest in the goods, but the property is here, the firm, as a business entity, is here, and this, therefore, should be, and under the law is, the place of taxation.

I come, then, to the conclusion that the tax complained of in this case is not a "duty of tonnage," and that the warrant under which this vessel is seized and held is so far good as to amount to a justification in this court of the seizure complained of. I do not say that it would be a justification in a court of law, for that question is not before me; but a court of admiralty, like a court of equity, looks into the substantial merits of the controversy, and I find this property subject to assessment in the city, that it was in form so assessed, and a warrant issued to the collector for the collection of the tax, and no reason is shown or made to appear why the tax should not be paid. If the property is taxed in the name of one owner instead of three, it is owing to the negligence of those owners in not returning their schedules, or calling for a correction of the books after the assessment was made.

The libel will, therefore, be dismissed with costs.

In re Whipple.

In re R. M. WHIPPLE.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JANUARY,
1876.

IN BANKRUPTCY.

BANKRUPTCY SUPERSEDES CREDITOR'S BILL.—Proceedings in bankruptcy supersede a creditor's bill in a state court; a receiver appointed by the state court can be compelled to deliver the property over to the assignee in bankruptcy, subject to all the rights which the creditors whom he specifically represents have obtained, and to all the priorities which they have obtained by their diligence.

This was a rule to show cause why certain judgment creditors of the bankrupt should not be enjoined from proceeding under creditors' bills against the bankrupt in the state courts, and from enforcing an assignment by the debtor to the receiver appointed in such creditors' suits.

On the 8th day of August, 1874, Louis Stix and others filed in the Circuit Court of Cook County an ordinary creditors' bill to enforce a judgment against Whipple previously recovered in that court. On the fourth day of November, 1875, a receiver of the debtor's effects was appointed in that suit, and the debtor was ordered to make an assignment of his effects to such receiver. On the 10th day of July, 1875, the Chatham National Bank and others filed a similar creditors' bill in the Superior Court of Cook County, upon judgments previously recovered therein against Whipple, and upon the 5th day of November, 1875, a receiver was appointed, and the debtor was ordered to assign his effects to such receiver. On the 24th day of November, 1875, and before the debtor had executed an assignment to the receiver in either creditors' suit,

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an involuntary petition in bankruptcy was filed against him in this court, on which he was adjudicated a bankrupt on the 6th day of December, and delivered his property to the marshal under the warrant in bankruptcy. The judgment creditors in each of the suits in the state courts above named, having taken proceedings therein against Whipple to enforce an assignment to the receiver appointed in each case, a rule was granted against them in this court to show cause why they should not be enjoined from further proceeding in the state courts.

E. & A. VanBuren and Tenneys, Flower & Abercrombie,
for the judgment creditors.

Edwin Bean and R. W. Smith, for petitioning creditors in
bankruptcy.

J. L. High, for the bankrupt.

BLDGERT, J.—This question came before me in the case of the National Insurance Company, which was also a case where a creditors' bill had been filed in the state court, on which a receiver was appointed and took possession of the assets of the company, and proceedings in bankruptcy were then instituted against the company. I had occasion to investigate the question very thoroughly in that case, and after a very careful examination in the light of the authorities, both in this country and in England, I came to the conclusion that the proceedings in bankruptcy superseded the creditors' bill; and that the receiver in the chancery suit would be obliged and could be compelled to deliver the property over to the assignee in bankruptcy, subject, of course, to all the rights which the creditors whom he specifically represented had obtained, and to all the priority which they had obtained by their diligence. I announced my conclusion in that case and the parties acquiesced in it.

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This class of cases, of course, brings up the difficult question of collision between the jurisdiction of the several courts, and I see no way to harmonize it except to assume that when proceedings in bankruptcy are properly instituted and take effect, they must of necessity supersede the proceedings on creditors' bills, subject to all the rights which the parties may have acquired by the steps taken. Now, if one creditor obtained a judgment in 1873, that judgment is *ipso facto* a lien upon the real estate of the debtor, and if anything is realized out of his real estate this lien would have to be respected. Then if he had acquired possession of any assets through his receiver, undoubtedly to the extent that assets had come into the receiver's hands, the authorities require the bankruptcy court to respect the lien thereby obtained.

How far we are to go in enforcing what counsel characterize as an equitable lien, simply by their having instituted proceedings in chancery and obtained the appointment of a receiver, is a question upon which I would prefer to reserve an opinion until we come to distribute the estate. That is a question that has never been fairly up. It is presented by Mr. Tenney in this case, he claiming that by their diligence in filing the creditors' bill, they have acquired a sort of blanket lien on the whole property. It seems to me utterly impossible to carry on the two administrations together; the estate should be administered in one court, and I think the bankrupt court the proper one. The assignee in bankruptcy necessarily, and by operation of law, takes possession of the assets, subject to the existing claims or liens of the creditors in the state courts. And I think that the better authority and the more reasonable doctrine is that the proceedings in bankruptcy supersede all other proceedings for the administration of the assets of the debtor, subject only to priorities which are obtained by any creditors by the use of diligence, which are to be respected and which should be paid in the order of priority, according to whatever rights have been obtained. Now, in this case, the receiver in the state court has

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obtained no property. The bankrupt reports to this court that he has turned over all his assets of every nature to the marshal of this court, under the warrant of seizure in bankruptcy. Under these circumstances, the bankruptcy court must go on and administer the estate, leaving these judgment creditors to assert their claims and priorities, if any, in this court. The question is not a new one, but has been frequently up, and until it is overruled by the Supreme Court, I shall insist upon this construction of the law.

Let the rule to show cause be made absolute, and the judgment creditors be enjoined from proceeding in the creditors' suits in the state courts, reserving all questions as to the priorities which they have there acquired, to be determined by this court hereafter.

Armstrong vs. Mechanics National Bank.

EDWIN R. T. ARMSTRONG vs. THE MECHANICS
NATIONAL BANK OF CHICAGO.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—MARCH,
1876.

IN EQUITY.

SETTLEMENT WITH CREDITORS—PREFERENCE—MISREPRESENTATIONS.

—Where a debtor who has made a settlement with his creditors, seeks to recover a certain sum paid by him to one creditor, above the percentage paid to others, it is a good answer that the settlement was obtained by misrepresentation, and that the debtor concealed a valuable portion of his assets.

The bill in this case was filed to recover the sum of thirteen hundred dollars paid by the complainant under the following circumstances:

Early in 1873, complainant became embarrassed, and being unable, as he claimed, to pay his debts in full, he entered into a composition arrangement with all his creditors, among whom was the defendant, by which he agreed to pay and they agreed to accept fifty cents on the dollar of their claims, such payment to be secured by notes indorsed or guaranteed by a third party.

The complainant alleged, however, that the defendant refused to sign the composition unless it should receive notes for ten per cent. in addition to the fifty per cent. agreed to be paid to the other creditors. This was denied by the defendant, which insisted that Armstrong regarded its claim as of a higher character than those arising from commercial transactions, it being for borrowed money, and that, after the com-

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position was signed, he volunteered to give the defendant his notes for the extra ten per cent.

It was admitted that the defendant did receive the complainant's notes for ten per cent. of its claim, in excess of what was received by the other creditors. These notes were assigned by the defendant to another bank, before maturity, and paid by the complainant. He thereupon filed this bill to recover the amount of the ten per cent. thus agreed to be paid to the defendant, alleging that the notes for the same were obtained from him in fraud of the rights of his other creditors, and without their knowledge.

The defendant insisted that the complainant had himself been guilty of fraud in not making a full disclosure of his assets to his creditors at the time the composition was obtained.

E. A. Otis, for complainant, cited:

Wood vs. Barker, Law Reports, 1 Equity Cases, 139; *Breck vs. Cole*, 4 Sandford, 79; *Lawrence vs. Clark*, 36 New York, 128; *Way vs. Langley*, 15 Ohio State, 392; *Russell vs. Rogers*, 10 Wendell, 473; *Cockshott vs. Bennett*, 2 Term Reports, 763; *Jackson vs. Loomas*, 4 Term Reports, 166; *Horton vs. Riley*, 11 Meeson & Welsby, 492; *Bean vs. Brookmire*, 7 Bankruptcy Register, 568; *Hatch vs. Hatch*, 9 Vesey, 292; *Jackman vs. Mitchell*, 13 Vesey, 581; Story's Equity Jurisprudence, 378; *Saddler vs. Jackson*, 15 Vesey, 52; *Howden vs. Haigh*, §11 Adolphus & Ellis, 1033.

McCagg, Culver & Butler, for defendant, cited:

Seving vs. Gale, 28 Indiana, 486; *Huntington et al. vs. Clark*, 39 Connecticut, 540; *Richards et al. vs. Hunt*, 6 Vermont, 251; *Clarke vs. Tipping*, 4 Beavan, 588; *Phettiplace vs. Sayles et al.*, 4 Mason, 312; *Mallalieu vs. Hodgson et al.*, 16 Queen's Bench, 689.

Armstrong vs. Mechanics National Bank.

BLODGETT, J.—This bill is filed to recover from the Mechanics National Bank thirteen hundred dollars, which, it is alleged, was extorted by the bank from the complainant, by moral duress, or, by taking an unfair advantage of the circumstances in which the complainant was placed at the time of the alleged transaction.

In 1873, Armstrong, then a merchant in this city, finding himself embarrassed in his pecuniary affairs, sought a composition with his creditors, and for that purpose made out a statement of his financial matters, assets, and liabilities, and presented it to his creditors, representing that from that showing he would be able to pay them fifty cents on the dollar.

The Mechanics National Bank was a creditor for money loaned, and interest accrued thereon to the amount of thirteen thousand dollars.

The allegation of the bill is, that Armstrong applied to the Mechanics National Bank to have them sign the composition; that they refused to do so unless he would also, in addition to paying them fifty cents on the dollar, give them his notes for ten per cent. more, making sixty cents on the dollar, and that in order to secure the assent of the bank to his composition, he did give them his notes according to the terms of the composition for the fifty cents, and then his further notes for the sum of thirteen hundred dollars, to make up the additional ten per cent. which was exacted from him.

This bill is now brought to recover back the excess over the fifty cents on the dollar, on the ground that it was extorted from him because of the peculiar circumstances under which he was placed.

The defense set up, is that the composition itself, offered and obtained by Armstrong, was fraudulent.

The evidence shows that Mr. Armstrong made out what purported to be an abstract, from his books, showing his liabilities and assets, which he presented to his creditors, claiming it to be a true one, and offering to allow his creditors to

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examine his books; that Mr. Page was the vice-president of the bank, and that his firm were also creditors of Armstrong to the amount of several hundreds of dollars, and that in his own behalf, as a member of the firm, and also as an officer of the bank, he examined Armstrong's books, was satisfied that fifty cents on the dollar was all that he could pay, and recommended the officers of the bank to accept the proposed compromise. Mr. Scammon, the president, claimed that an indebtedness to a bank for borrowed money stood upon a different footing from a commercial indebtedness for goods sold, and that the bank ought not to compromise for the same amount.

It is claimed that on making out this statement, upon which the compromise was finally effected, Mr. Armstrong omitted from his statement of assets, a valuable farm in the central part of Illinois, which cost him over three thousand dollars, and a thousand dollars full paid stock in the Republic Life Insurance Company, and the evidence shows very satisfactorily and completely, that he did keep back from some of the creditors the knowledge of his interest in this farm.

The law undoubtedly requires that parties seeking or making a composition with their creditors should make a full and honest disclosure of their affairs. Any withholding information valuable to creditors vitiates the entire transaction. It also, undoubtedly, authorizes a party who, for the purpose of getting a given creditor to sign, is compelled to pay more than he pays other creditors to recover back from the extorting creditor the amount which he is paid in excess of the others. But it strikes me very forcibly, and I can see no escape from the position, that a creditor, coming as Mr. Armstrong now does into this court, to recover money which he claims has been extorted from him, must come with clean hands and be able to show that the composition which he sought to, and did, obtain from his creditors, was such an one as they would have indorsed if they had known all the facts.

Now, here are four thousand dollars of this debtor's assets

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concealed from the creditor whom he now calls into court to answer for unfair practice, and I have no doubt that this creditor may reply to such demand by saying that the composition obtained was a dishonest one; nor have I any doubt that if Armstrong were now solvent, a cross bill might be filed to recover the full amount of the debt.

The evidence regarding this farm has been extorted from Armstrong in such a manner as to make it at least a very strong circumstance against his good faith. Of course, there may be such a thing as a man with fifty or sixty thousand dollars assets, overlooking an item of this kind; but in the first place, Armstrong's commercial books, to which he invited his creditors' scrutiny, contained no reference whatever to this farm, and it does not appear that Mr. Page's attention or notice was called to it. Nor does it appear in his exhibit of assets and liabilities. When the defendant first began to ascertain that there was any withholding of information regarding assets, Armstrong was asked if the exhibit which he presented to Mr. Page, and upon which this composition was negotiated, contained a true statement of his liabilities and assets. He said, finally, after some hesitation—"Certainly it is true, as far as the liabilities are concerned."

Subsequently, he was asked if he had any interest in this farm: he stated that the title was in his wife. It was subsequently developed—extorted item by item—that the facts regarding the farm were these:

Sometime in 1868, he bought this farm at a cost, including improvements, of over three thousand dollars, placed the title in the name of his wife, and his father in possession. In 1871, Mrs. Armstrong died, leaving a will in which she devised this property to her husband, which will was never probated, but was retained by Armstrong in his own possession.

During the time this settlement was being negotiated with his creditors the facts regarding this farm were certainly withheld from Mr. Page, and the officers of the Marine Bank.

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It seems to me that there was clearly such concealment of some part of this party's assets, as to at least constitute a sufficient answer to his present claim of having been unfairly dealt with; that the complainant is not in such a position that he can complain of unfair dealing on the part of the defendant.

The bill is dismissed.

To pay one creditor or his agent a larger sum than was to be paid to others, as a condition of accepting a compromise, is void, and if the creditor's agent was specially retained by the debtor to urge the compromise, any promise to pay the agent for such service is void. *Bullens vs. Blain*, *ante*, p. 22.—[*Reporter*.

In re Sutherland.

In re ISRAEL SUTHERLAND.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—MARCH,
1876.

IN BANKRUPTCY.

A certificate of membership in a Board of Trade is not an asset which passes to the assignee in bankruptcy.

Motion for a rule on the bankrupt, a member of the Chicago Board of Trade, that he assign and transfer to the assignee his certificate of membership in said board. The bankrupt opposes the rule on the ground that the certificate is not an asset which passes to the assignee.

Samuel Kerr, for assignee.

Ewing & Leonard, for Sutherland.

F. Ullmann, for Board of Trade.

BLODGETT, J.—The Chicago Board of Trade is a corporation constituted by a special act of the legislature of Illinois, with a nominal capital of \$200,000. The object of the association is declared to be: "To maintain a commercial exchange; to promote uniformity in the customs and usages of merchants; to inculcate principles of justice and equity in trade; to facilitate the speedy adjustment of business disputes; to acquire and disseminate valuable commercial and economic information; and generally to secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits."

In re Sutherland.

By its charter the corporation is prohibited from carrying on any business except such as is usual in the management of boards of trade or chambers of commerce. No dividends are made upon its stock. The funds of the association are derived mainly from the initiation fees paid by members, annual assessments, and such fines and forfeitures as are imposed upon members for the violation of its rules and regulations, and are expended in the expenses of the organization in procuring and disseminating information among members. Persons are admitted as members on written application indorsed by two members, and on approval by the affirmative ballots of at least two-thirds of the members of the board of directors, and the payment of the initiation fee of \$1000, and signing an agreement to abide by the rules, regulations and by-laws of the association, and all amendments duly made thereto. Any member is liable to be expelled or suspended for the violation of the rules and regulations, extortion, bad faith, dishonorable or dishonest conduct.

It will be seen there is no pecuniary profit to the members of this body, further than what is derived from the incidental use made by a member of the privileges which his membership gives him. It confers no property rights; that is, it represents no interest in property, but only, like the membership of a Masonic lodge, or church, or social club, confers upon the member the privileges of the order.

There is a provision in the rules by which a member who has paid all assessments due, and has against him no outstanding or unadjusted or unsettled claims or contracts held by the other members, whose membership is not in any way impaired or forfeited, may transfer his certificate to any other person eligible to membership, after ten days' notice, posted on the bulletin board of the exchange, and approved by a vote of two-thirds of the board of directors, and it is admitted that at the present time a membership will sell for about \$500, when the seller and buyer are able to comply with the regulations in regard to transfer. I have been unable to find any direct au-

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thority bearing upon this question, but from analogies I can not see what right this membership confers that can be called property. True, it may be valuable to the member, as is a license to a pedlar, auctioneer, distiller or liquor dealer; but it confers a mere personal privilege. It does not pass to the assignee in bankruptcy by operation of law. The assignee does not become clothed with the rights of membership by virtue of his office and the deed by the register, as he does in respect to the other assets of the bankrupt. He does not even succeed to the rights of a purchaser except by consent of the proper quorum of the board of directors. The certificate expresses nothing which the assignee can use except by the favor and consent of others.

Without discussing the question further, then, I am of the opinion that the bankrupt's membership in this board, being in the nature of a franchise, title, or privilege, does not vest in or pass to his assignee, and cannot be treated as a portion of his assets. It confers no property right, but only the right to trade upon the board, frequent its chambers and exchanges, participate in the information collected, and avail himself of the remedies given to members under the by-laws. But he cannot sell these privileges to a stranger without the consent of the board, through its board of directors, and then only on certain conditions.

The rule is denied.

Scott *vs.* Clinton & Springfield R. R. Co.

THOMAS A. SCOTT *et al.*, TRUSTEES ETC., *vs.* THE
CLINTON AND SPRINGFIELD R. R. COMPANY.

CIRCUIT COURT.—SOUTHERN DISTRICT OF ILLINOIS.—MARCH,
1876.

1. REMOVAL FROM STATE COURT—ANOTHER SUIT IN THAT COURT.—The existence of a suit by stockholders of a railroad company, and even possession by trustees under the order of the state court therein, do not affect the right to remove into the federal court a suit brought by bondholders under a deed of trust, which is paramount to the rights of the stockholders; and the possession must follow into the federal court.

2. ROLLING STOCK.—The provision in the Illinois Constitution of 1870, that the rolling stock of a railroad company shall be deemed personal property, does not change the rule that a mortgage made by the company, covering all after-acquired property, includes such acquired rolling stock, if obtained before the rights of execution creditors attach.

3. TERM FOR REMOVAL.—The term at which a cause could be first tried, within the meaning of section 3, of the act of March 3, 1875, is the term at which the issues are first made up, the party applying for removal not having been guilty of negligence.

4. A *certiorari* is not necessary where the record of the state court is already before the federal court.

This cause, originally instituted in the circuit court of McLean county, Illinois, was removed to the Circuit Court of the United States for the Southern District of Illinois, in December, 1875, under the act of Congress of March 3, 1875, and a motion having been made by Henry Crawford on behalf of the respondents to strike the record from the files, and Treat, J., having intimated a desire to have the opinion of Drummond, J., upon the question, the motion was argued before Drummond J., February 14, 1876, by Mr. Crawford for the motion, and R. Biddle Roberts, of Chicago, for the plaintiffs, *contra*.

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Drummond, J., having intimated an opinion, and Treat, J., concurring, an order was entered at Springfield on the 15th of February, taking jurisdiction of the case, and requiring the defendants to answer.

Subsequently an application was made to the court, praying them to rescind the order taking jurisdiction of the case, and the court allowed the same to be heard, and on March 8th, 1876, it was re-argued.

Lawrence Weldon, for the motion to remand.

R. Biddle Roberts and *Robert E. Williams*, *contra*.

DRUMMOND, J.—This was a suit originally brought in the Circuit Court of McLean county, and which has been removed from that court to this court under the act of Congress of March 3, 1875.

At the time the application was made to the state court for the removal of the cause, there was also pending in the Circuit Court of McLean county a bill filed by one Kelly for himself and others as stockholders of the railroad company, against the company and the directors, in which the latter were charged with certain wrongful acts, to the injury of the stockholders, among which was one that the directors were interested in a company known as the Morgan Improvement Company, which had contracted to construct the railroad, upon which contract the directors had realized large profits, and it was claimed that these profits should inure to the benefit of the company. That case had gone to a decree, which was affirmed by the Supreme Court of the state, and all the questions in the case appear to have been settled except the taking of an account.

The plaintiffs in this suit are trustees and bondholders under a certain deed of trust given by the railroad company to secure bonds which had been issued for the construction of the railroad, and which it is not controverted were paramount

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to any claims which might exist on the part of the plaintiffs in the Kelly case, upon the property of the road, or upon profits that might be realized upon any contract made by the directors, and which might inure to the company.

The state court had appointed a receiver in the Kelly case, who, in August last, had been superseded by the appointment of two of the plaintiffs in this case, Scott and Jewett, as trustees, under the deed of trust, the receiver being required to deliver to them all the property held by him as receiver. The trustees were restrained from selling the property until the further order of the court, but were to receive and hold it, and operate the road, under the powers vested in them by the deed of trust, and they were to retain, use and operate the road until the further order of the court, or until discharged from their trust according to law.

At the same time an order precisely similar was made by the state court in this case, so that Scott and Jewett had possession of the road, and were operating it as trustees under the deed of trust (which authorized them in a certain contingency so to do), and in conformity with the order of the state court.

This being the condition of the two cases, and a record of this case being filed in this court, a motion is made, the effect of which is to remand the cause to the state court, *first*, for the reason that at the time the application was made for a removal, the order made in August in the Kelly case so operated upon the property that it was still in the custody of the state court, in the hands of the trustees, as *quasi* receivers; and *second*, because the petition filed by the plaintiffs in this case for the removal of the case was not in apt time. No objection is made to the sufficiency of the petition, or of the bond given in the state court, and there is no controversy but that the plaintiffs in this case and the defendants were citizens of different states, and so that the cause as to citizenship was removable.

As to the first objection: the suit in the Kelly case was a

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controversy in relation to the property confessedly subordinate to any rights existing on the part of the trustees and bondholders under the deed of trust, the plaintiffs in this case. The controversy existing in the Kelly case was substantially settled when the application was made for removal in this case. That case did not claim to interfere with the rights of any of the bondholders, or of the trustees representing them. This, then, was a controversy at the time the application was made, wholly between citizens of different states. Did the order made in August by the state court in the Kelly case, turning the property over to the trustees as custodians, to hold and operate the road under the deed of trust, prevent the removal of this cause? It is to be observed that that order was in no respect different from that made in this case by the state court; the property, therefore, was just as much in the possession and control of the trustees in this case as in the Kelly case, and when the case is removed to this court, if by law that can be done, it necessarily brings with it the order made by the state court transferring the property to the trustees in this case, and the order certainly is just as binding and conclusive upon the rights of parties in this case; and the question is, whether the court cannot look into the real controversies existing in the two cases, for the purpose of determining whether or not the order made by the state court in the Kelly case could prevent the removal of this case.

It is manifest that the order in both cases was made because the deed of trust authorized, under certain circumstances, the trustees to take possession of the property.

It is not disputed but that the circumstances authorizing such possession under the deed of trust had occurred, and that, independent of the order of the court, the trustees had a right, according to the terms of the deed of trust, to take possession of the property.

The effect, then, of the order made in each case, was to put the trustees in possession under the deed of trust, and because there was a litigation pending, affecting the property in the

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two cases, to make the trustees subject, to some extent at least, to the control of the court. But it seems to me that when we are considering a question of jurisdiction, and whether or not these parties in an independent suit, seeking different relief, can be prevented from exercising an undoubted right under the act of Congress, we can look to the real status of the two cases to determine whether this is an insuperable obstacle to the removal of the cause.

A receiver had been appointed in the Kelly case. That receiver had been removed because, it is to be presumed, the court deemed the trustees, under the circumstances, the proper custodians of the property. In fact, it seems to be conceded that the Kelly case was not one where a receiver should have been appointed. It may be regarded, therefore, only a possession of the trustees, so far as the court was concerned, for the purpose of exercising a certain control over the property, so as to protect the rights of all parties. Now what rights have any of the parties in the Kelly case, as compared with the plaintiffs in this case?

In this case their rights are paramount. This is a distinct and separate controversy, with which the Kelly case has nothing to do. All serious questions in that litigation have been settled by the opinion of the Supreme Court of the state; they do not interfere with the controversy in this case, and as to the possession of the property, that is substantially under the authority of the deed of trust to which these plaintiffs are parties, and under which it is their duty to take possession and operate the road in the interests of the bond-holders, whom the trustees represent. And certainly, as already mentioned, the effect of the order of the state court, so far as it can have any upon the right of removal, is just as strong, and places just as effectually the property in the possession of the trustees in this case, as it does in the Kelly case.

A priority of equity and of right must give this court a paramount control over the property, where the case is re-

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moved, as we think it can be, from the state to the federal court. It follows, therefore, that the control of the state court over the property in the Kelly case, as against the trustees in this case, and the parties and interests they represent, is little more than nominal, and if the trustees are called on by the state court, it would be sufficient to answer that they are subject to the terms of the deed of trust, and to the orders of this court in this case, at least to the extent and priorities of the interests the trustees represent.

It is said, however, that there is, or may be, a large amount of property not covered by the mortgage or deeds of trust, and therefore not subject to the claims of the bondholders represented in the mortgage.

There seems to be considerable misapprehension as to the effect of the provision in the constitution of 1870 in this state, which declares that the rolling stock and other movable property of railroads shall be personal property. I do not understand that this changes the rule of equity which the Supreme Court of the United States declared in the case of *Pennock et al. vs. Coe*, 23 Howard, 117, to the effect that whenever a mortgage is made by a railroad company to secure bonds, and the mortgage includes all present and after-acquired property, as soon as the property is acquired, the mortgage operates upon it. In other words, it seizes the property or operates on it by way of estoppel as soon as it comes into existence, and is in possession of the mortgagor, and the mortgagees, under such circumstances, have a prior equity to the claims of creditors obtaining judgments and executions after the property is thus acquired and placed in possession of the mortgagor. That was a case of locomotives and rolling stock which had been purchased by the mortgagor long after the mortgage was executed, and of which the mortgagor had acquired possession prior to the obtaining of judgments by the parties who sought to make them available for the payment of their debts.

That principle has been adhered to in the case of *Dunham vs.*

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R. W. Co., 1 Wallace, 254, and also in the case of *Galveston Railroad Company vs. Cowdrey*, 11 Wallace, 459, and must be considered as the settled law of the federal courts upon that subject, so that all property that was acquired in this case by the railroad company, the deeds of trust having expressly declared that it was given for all the property then in possession of the railroad, or thereafter to be acquired, was covered by the deed of trust, and the mortgagees have a superior equity as against all parties who, at the time that any after-acquired property came into possession of the railroad company, had not an inchoate or perfect lien upon the same.

The principles declared in the case of *Coe vs. Pennock*, and other cases referred to in the Supreme Court of the United States, directly apply in this case. I do not understand that it makes any difference whether the property is real or personal. It is true that we have, as a sort of necessity of the case, and yielding, to some extent, to the statute of this state, where supplies and materials have been furnished to a railroad, and the diligence required by the statute has been used by the creditors to enforce their claims within six months, allowed the payment of those claims, which, perhaps, is stretching the principle referred to as decided by the Supreme Court beyond its legitimate operation.

Then, as to the second objection, that the application was not made in time: The third section of the act of 1875, declares that a party seeking a removal from the state to the federal court, shall make and file a petition in the suit in the state court, before or at the term at which said cause could be first tried, and before the trial thereof.

It is objected, that as more than a term elapsed from the time that this suit was pending in the state court before the application was made, therefore it was too late; and the question arises as to the true construction of this part of the third section of the act of 1875.

When is the term at which the cause could be first tried, and when is it that it can be said to be before the trial there-

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of ? Could this cause have been tried or heard before this application was made ? We are required to say, upon the facts as they appear in the record, that this cause could have been tried at a term before the application was made. In a case which was recently decided by me at Chicago, I held that where a cause was pending in the state court, being a bill in chancery, and where an answer had been filed and an issue thereon, and where it appeared that the cause could have been tried, but that by consent of both parties it had been continued over the term, the application for removal came too late, for the cause was at issue and could have been heard, as it satisfactorily appeared, by the court, and therefore the action of the parties in postponing it was neither an act of the law or of the court, and consequently the application came too late.

But in this case, there was not only no issue when the application was made, but there was no answer filed by the parties. It does not appear that there had been any such negligence by those who made the application in this case, as to deprive them of the right which was clearly given by the act of 1875. The object of this provision of the law was to prevent parties from making an application after the term when the cause could have been tried.

Now, the cause cannot be heard until there is an issue; and in this case, therefore, it was not competent for the court to try the case, there being no issue before the court to try. And, therefore, I think that within the meaning of the law, a term had not elapsed during which the cause could have been heard. It is to be regretted, perhaps, that the language of the statute upon this subject is not more precise. It will be observed that is more especially applicable literally to the trial of a case at law at "the term at which said cause could be first tried;" and it is often a matter of difficulty to determine what is the first term at which a chancery cause can be tried or heard. Whether the parties seeking a removal could be guilty of such laches as to prevent it, although an

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issue had not been made up, and the cause might not be ripe for hearing, it is not necessary now to decide. It is sufficient that it does not affirmatively appear in this case, upon inspection of the record, that such laches existed on the part of these plaintiffs. Neither is it necessary to decide whether it is competent for this court to hear evidence on that point outside of the record. It is sufficient for us to decide the case as it exists before us.

We think that this is a controversy between citizens of different states, and that the application was made for removal at or before the term at which the cause could be first heard, and that, therefore, it is properly removed to this court.

The only object of a *certiorari*, upon which stress is sometimes laid, is to bring the record from the state into the federal court.

The act of 1875 provides for the issue of that writ by the federal court, in cases within the terms of the act, and gives the federal court power to enforce the writ. But here the record itself of the state court is before us, and the issue of a *certiorari* would therefore be a useless act.

The motion to remand is overruled.

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ABATEMENT.—*See* PLEADING, 5.

ADMIRALTY.

1. **INFORMATION—SEIZURE ESSENTIAL TO JURISDICTION.**—In cases of information an actual seizure of the *res*, prior to the filing of the libel, is essential to the jurisdiction of the federal courts. *The Tug May and The Tug Oconto*, 243.
2. United States Statutes and decisions of the Supreme Court commented upon. *Id.*
3. **SEIZURE, WHO SHOULD MAKE.**—The Secretary of the Treasury may authorize any United States Officer to make the seizure; and in the absence of such authority, it is the duty of the customs officers. *Id.*
4. **LIBEL FOR REPAIRS.**—Where a vessel goes from her home port to another state for the express purpose of being repaired, and the owners have no personal credit, a libel will lie against her at her home port for the balance due for such repairs. *The Christopher North*, 414.
5. **LACHES IN ENFORCING LIEN.**—A seaman's lien for wages will not be enforced in admiralty, as against a *bona fide* purchaser, after the lapse of two seasons. Such a claim has become "stale." *The Harriet Ann*, 13.
6. Though courts of admiralty are not governed by any absolute rule of limitations, they will never do injustice to *bona fide* purchasers by the enforcement of old secret liens. *Id.*
7. **LIMITED LIABILITY OF SHIP OWNERS.**—A steamer used in the upper Mississippi river, is not within the act of Congress of March 3, 1851, limiting the liability of ship-owners. The district court will not, therefore, restrain claimants from suing the owner at common law to recover the full value of freight lost by fire. *The War Eagle*, 364.
8. **OBSTRUCTING NAVIGATION.**—A vessel has no right to obstruct the channel by stretching a line across it, and if she does, is liable for damages sustained thereby by passing raft or vessel. A raft is under no obligation to look out for such an obstruction. *McCord vs. Steamboat Tiber*, 409.
9. **CONTRIBUTORY NEGLIGENCE.**—The common law doctrines of contributory negligence do not apply to admiralty law. *Id.*
10. **ELECTION OF REMEDY.**—The sufferer has his election to sue at com-

ADMIRALTY—Continued.

mon law or in admiralty, and in either case the law of the forum must prevail. *Id.*

11. **DAMAGES FOR PERSONAL INJURIES.**—For permanent spinal injuries to a pilot, disabling him from following his profession, fixed at \$2,500. *Id.*
12. **CITY TAX AGAINST VESSEL NOT DUTY OF TONNAGE.**—The assessment of a vessel owned in a city, by the city assessor, for city taxes is not a "duty of tonnage" within the meaning of the United States Constitution, Article I., § 10, first clause. *The North Cape*, 505.
13. **JURISDICTION OF ADMIRALTY.**—A court of admiralty has jurisdiction to try the question of unlawful seizure of maritime property for taxes or duties. *Id.*
14. **ASSESSMENT AGAINST VESSEL BY NAME.**—It is not a valid objection that the assessment and warrant are against the vessel by name and not against the owner. *Id.*
15. **WHAT CONSTITUTES VALID ASSESSMENT AND WARRANT.**—The owner not having listed the vessel for taxation as required by law, an assessment by the assessor, showing the name of the apparent owner, the description of the property, and its valuation, is sufficient to found a legal warrant. It is too late for the owner to object after the warrant has been issued. *Id.*
16. **SECRET OWNERSHIP.**—An assessor is not required to look into the secret ownership of personal property, but may assess it against the apparent owner by possession or muniment of title. *Id.*
17. **DISTRIBUTION OF PROCEEDS.**—Where a vessel has been sold under a libel for wages and the proceeds paid into the registry, they should be distributed as follows:
 1. The libel for wages and costs thereof. *Id.*
 2. A regular and duly recorded mortgage. *Id.*
 3. The clerk's, marshal's, and proctor's fees in the various petitions filed limiting proctors' fees where they have filed more petitions than necessary.
 4. The balance *pro rata* among material and supply men, they being at the home port. These have not, since the *Lottawanna* case, a prior lien, even though so stated in the state statutes. *The Kate Hinchman*, 367.

BANKRUPTCY—See WAGER CONTRACTS.

1. **JURISDICTION.**—The United States Circuit Court has jurisdiction of a bill by an assignee to recover money or property of the bankrupt preferentially or fraudulently conveyed. *Flanders vs. Abbey*, 16.
2. **CONFLICT OF JURISDICTION—BANKRUPTCY COURT—WHEN SUPREME.**—When the bankrupt law cannot be properly administered by the bankruptcy court, owing to the interference of a state court and its determination to adjudicate upon the rights of parties and property in the bankruptcy court, then the latter ought not to hesitate to assert its authority. *In re Miller*, 80.

BANKRUPTCY—Continued.

3. In questions under the Bankrupt Act, the federal and state courts are not independent, but the former are superior. *Id.*
4. **FRAUDULENT PREFERENCE.**—The finding of a jury, that the debtor had committed an act of bankruptcy by making a preference to a creditor in transferring property to him, was in this case substantially an instruction to the marshal to take possession of it, or a ratification of his act, and the marshal was authorized so to do. *Id.*
5. **STATE TRIBUNALS BOUND.**—A decision by the bankruptcy court that a transfer was in fraud of the act is binding upon the state courts, and the creditor must come into the bankruptcy court to assert his rights as against such decision. *Id.*
6. **ENJOINING SUIT IN STATE COURT.**—If, however, he sue the marshal and the assignee in trespass in a state court, the bankruptcy court may enjoin the parties to the suit. *Id.*
7. **JURISDICTION OVER CORPORATION IN HANDS OF RECEIVER.**—The amendment of February 3, 1873, to the Bankrupt Act, does not deprive the bankruptcy courts of jurisdiction over a corporation of which a receiver had been appointed by a state court. *In re National Life Insurance Co.*, 35.
8. This amendment does not oust the federal courts of jurisdiction, but simply saves the acts done by the state court and receiver prior to the filing of the petition. *Id.*
9. **BANKRUPTCY SUPERSEDES CREDITOR'S BILL.**—Proceedings in Bankruptcy supersede a creditor's bill in a state court; a receiver appointed by the state court can be compelled to deliver the property over to the assignee in bankruptcy, subject to all the rights which the creditors whom he specifically represents have obtained, and to all the priorities which they have obtained by their diligence. *In re Whipple*, 516.
10. **NATIONAL BANK—RECEIVER.**—The power conferred by the banking act upon the Comptroller of the currency, to wind up the affairs of a national bank in certain contingencies, does not exclude the authority of a competent tribunal to appoint a receiver in other cases. In cases not within the special provisions of the Banking Act, a national bank may be proceeded against in the same manner as any other debtor or corporation. *Irons vs. Manufacturers' National Bank*. 301.
11. *Kennedy vs. Gilson*, 8 Wallace, 498, commented on. *Id.*
12. **INSOLVENT CORPORATION—MARSHALING ASSETS.**—The proper remedy against an insolvent corporation when its assets are of such a nature that they cannot be levied upon and sold under execution, is a bill in equity to marshal and distribute its assets. *Id.*
13. **ACT OF INSOLVENCY.**—The term "act of insolvency," in the fifty-second section of the Banking Act, means any act which would be an act of insolvency on the part of an individual banker, not simply such an act as authorizes the Comptroller, under the banking act, to appoint a receiver. *Id.*

BANKRUPTCY—Continued.

14. **PREFERENTIAL PAYMENTS.**—Where the officers have been making preferential payments, a court of equity, on the application of a depositor, will appoint a receiver. *Id.*
15. **WITHDRAWAL BY CREDITORS FROM BANKRUPTCY PROCEEDINGS.**—Creditors who, since the amendment of June 22d, 1874, have joined in the petition cannot afterwards be allowed to withdraw from the proceedings. *In re Heffron*, 156.
16. Such a practice would lead to underhand agreements between the debtor and a part of his creditors at the expense of the others, and cannot be allowed. *Semble*,—If all desire to dismiss the proceedings it could be done. *Id.*
17. **PETITION BY SINGLE CREDITOR.**—Since the amendment of June 22, 1874, the petition by a single creditor will not be sustained, if it appear that he did not have good reason to believe that he constituted the requisite proportion of the creditors; and upon this question affidavits and depositions may be taken and the debtor should not be required to file a schedule of his creditors, and the petition may be dismissed on motion. *In re Scammon*, 145.
18. **THE AMENDMENT OF JUNE 22, 1874**,—respecting the number and amount of petitioning creditors, has no application to cases in which an adjudication had been entered. *In re Raffauf*, 150.
19. **CONCLUSIVENESS OF ADJUDICATION.**—The adjudication is a decree of the court, and is beyond legislative control. *Id.*
20. **PRACTICE AS TO NUMBER AND AMOUNT OF PETITIONING CREDITORS UNDER THE BANKRUPT ACT AS AMENDED JUNE 22, 1874.**—Creditors' petition must show affirmatively that the requisite number of creditors join therein. Such allegation may, however, be made upon information and belief. *In re Scammon*, 130.
21. **PENDING CASES.**—In cases pending at the time of the passage of this amendment, the petitioning creditors must amend their petition, and insert the allegations as to number and amount of the petitioning creditors. *Id.*
22. **ALLEGATION JURISDICTIONAL.**—In all cases the creditors must make this allegation before the debtor can be required to show cause, or even file a schedule of his creditors. *Id.*
23. **ARGUMENTUM AB INCONVENIENTE**,—can not be considered by the bankruptcy court; a creditor wishing the benefits of the law must comply with all its requirements. *Id.*
24. **PETITION VERIFIED.**—The amended petition must be sworn to in the same manner as an original petition. *Id.*
25. On the call of the calendar, a pending petition will not be dismissed, absolutely, but leave to amend will be granted. *Id.*
26. The allegation that the requisite number of creditors join in the petition, is not sufficient, even when admitted by the debtor; the court must be satisfied that such is the fact. *Id.*
27. **LIST OF CREDITORS MUST BE VERIFIED.**—Since the amendment to

BANKRUPTCY—Continued.

- the bankrupt act of June 22, 1874, a statement of his creditors filed by the debtor on denial of bankruptcy must be verified. *In re Steinman*, 166.
26. **PRACTICE IN FILING PETITION.**—Under the amendment of June 22, 1874, if it appears that the requisite number of creditors have not joined in the petition, the court will dismiss it on motion, without requiring the debtor to file a schedule. On such motion the court will hear affidavits and evidence offered by either party, and will order the person verifying the petition to be examined before the register. *In re Scammon*, 195.
29. In determining whether the requisite number of creditors have joined in a petition under the amendment of June 22, 1874, only those are to be counted whose debts are unconditionally provable. Those claiming liens or holding security cannot be reckoned. *In re Frost*, 218.
30. **ATTACHING CREDITOR MAY CONTEST ADJUDICATION.**—An attaching creditor, though not a party to bankruptcy proceedings, may contest adjudication on the ground that the requisite number and amount of creditors have not joined in the petition. *In re Hatje*, 486.
31. **COSTS OF ATTACHMENT PROCEEDINGS.**—do not constitute a demand against a debtor which can be included in estimating the amount of his provable debts, nor will such costs be paid from the funds of the estate unless such proceedings were auxiliary to contemplated bankruptcy proceedings and beneficial to the estate. *Id.*
32. **EVIDENCE—LETTERS TO THIRD PARTIES.**—Letters written by the debtor to third parties, admitting the payment of a claim, are admissible in evidence in a contest between attaching and petitioning creditors, where the former attempt by interposing such claim to defeat adjudication. *Id.*
33. **NON-PROVABLE DEBT.**—A claim for money loaned to a debtor to aid him in the commission of an act of bankruptcy cannot be included among his provable debts. *Id.*
34. **STATUTE OF LIMITATION—HEIRS.**—Where a debtor had filed a petition in bankruptcy, his only debts being apparently barred by the statute of limitations, his widow and heirs cannot procure a withdrawal of the property from the bankruptcy court, even though no debts had been proved against the estate. They may have been taken out of the statute, and if provable at the time of filing the petition they would not be barred subsequently. The statute ceases to run on the filing of the petition. *In re Wright*, 317.
35. **DELAY OF CREDITORS.**—The heirs of the bankrupt cannot profit by delay of creditors in proving their debts; and the widow of an intestate has no possible standing in court, her dower claim not passing to the assignee. *Id.*
36. **BARRED DEBTS.**—In Wisconsin, a demand barred by the statute of

BANKRUPTCY—Continued.

- limitations is not provable against the estate of the bankrupt. *In re Noesen*, 443.
37. *It seems*, that a debt barred by the statute of limitations of the state where the bankrupt resides cannot be proved in bankruptcy. *In re Reed*, 250.
38. **PROOF OR WAIVER.**—Less strictness of proof is required to establish a promise by the debtor *before* the bar of the statute has attached, than to prove a new promise *after* the debt has become barred. *Id.*
39. **INTEREST** will not be allowed where the debt depends upon the new promise. *Id.*
40. **POWER OF ATTORNEY.**—An attorney cannot act for a creditor at meetings held in the course of proceedings in bankruptcy, unless authorized to do so by a letter of attorney acknowledged before a Register in Bankruptcy or United States Commissioner. *In re Christley*, 154.
41. **FAILURE TO SURRENDER OR ACCOUNT FOR PROPERTY—CONTEMPT.**—If it appears to the district court that a bankrupt has neglected or refused to surrender any property which ought to come into the bankruptcy court, or fails or refuses to give a satisfactory account of his property or his dealings previous to bankruptcy, the court may order him to surrender such property, or properly account for it, and on failure so to do he may be committed for contempt. *In re Salkey & Gerson*, 269.
42. **INSUFFICIENT ANSWER.**—Where property is traced to the bankrupt, it is not a sufficient answer that he cannot say what became of it. The court must be satisfied that the bankrupt has fully and honestly accounted for the property according to the facts. *Id.*
43. **DEPLETION OF STOCK—PRESUMPTION.**—Where, just prior to the proceedings in bankruptcy, the bankrupt's stock of goods was rapidly diminishing, and not in the ordinary course of business, the legitimate conclusion is that it was fraudulently removed and concealed, and the bankrupt will be presumed to still have control of it. *Id.*
44. **COMMITMENT FOR NOT FULLY DISCLOSING PROPERTY.**—Under the twenty-sixth section of the bankrupt act the district court has authority to commit a bankrupt, if satisfied that he has not fully disclosed the facts concerning his property. *Ex parte Salkey*, 280.
45. **COURT MUST BE SATISFIED.**—The court is not bound to accept his answer, that he has told all that he knows about his property, if it clearly appears that there is still property unaccounted for. *Id.*
46. The district court must be satisfied that he has made a full disclosure, and *it seems* that the circuit court has power to review the finding if the evidence is brought before it. *Id.*
47. **PRACTICE.**—The circuit court may direct the district court to allow the bankrupt to be re-examined before the register; and on the return of an attachment the court should examine the bankrupt. *Id.*
48. **SURRENDER OF PROPERTY AND PROOF OF DEBT.**—In a case simply

BANKRUPTCY—Continued.

- of constructive fraud, a mortgagee who has taken the mortgaged property and held it until a trial and finding against him in favor of the assignee, but who then, and before judgment, surrenders the property, may be allowed to prove his debt in bankruptcy. *Burr vs. Hopkins*, 345.
49. In this case he was ordered to pay a reasonable fee to the counsel for the assignee, and all costs and special expenses. *Id.*
50. GUARANTOR—WHEN CANNOT PROVE DEBT.—The guarantors of a note, the holder of which had forfeited his claim against a bankrupt estate, have no right to prove against the estate, their liability having already been discharged by the act of the principal. *In re Ayers*, 48.
51. PARTICIPES CRIMINIS.—If the guarantors participated in the act by which their principal forfeited his claim, they occupy no better position, and cannot prove. *Id.*
52. PREFERENCE—RELEASING GUARANTOR.—Where the holder has taken a preference, in fraud of the Bankrupt Act, and a recovery has been had against him by the assignee, payment of the judgment does not revive his right to prove against the estate; and by such preference he has released the guarantors, and they have no claim against the estate. *Id.*
53. REVIVING LIABILITY.—*It seems*, that a guarantor, not legally liable to the holder, cannot, by any subsequent promise, revive the liability of the estate. *Id.*
54. ASSESSMENT BY COURT DOES NOT ESTABLISH VALIDITY OF NOTE.—The order of assessment by the bankruptcy court does not bind the maker as to the validity of the note—his defense to the note can be heard when action is brought upon it. *Lamb vs. Lamb*, 420.
55. BANKRUPTCY OF SUBSEQUENT MORTGAGEE is no objection to the execution of the power of sale in the prior incumbrance. *Long vs. Rogers*, 416.
56. LOSS ON STOCK SOLD WITHOUT LEAVE OF COURT.—Brokers carrying stock on a margin, which at the time of the commencement of bankruptcy proceedings could have been sold out at a profit, but who carry it until a decline, and finally close it out at a loss, all without application to the court, cannot prove their claim for differences against the estate. *In re Daniels*, 405.
57. A broker who holds stocks on a margin is bound to take notice of the buyer's bankruptcy. *Id.*
58. If a broker, who holds stocks on a margin, continues to hold them for an unreasonable length of time after the buyer's bankruptcy, and then sells them without notice, he must sustain the loss. *Id.*
59. COMPOSITION MEETING.—Instructions given to Indiana registers as to manner of calling and conducting composition meetings. *In re Spades*, 448.
60. CALCULATING MAJORITY.—The proper construction of the clause as

BANKRUPTCY—Continued.

- to calculating a majority is that creditors whose debts do not exceed \$50, shall be counted in determining the value, but not in determining the number. *Id.*
61. **SECURED CREDITORS** are those who hold a lien upon property which otherwise would go into the general fund, not those who have personal security. This latter class may prove and vote as unsecured creditors. *Id.*
 62. **ACCEPTANCE IN PARTNERSHIP CASES.**—A composition should not be allowed to work inequality or injustice, as between individual and partnership creditors. If there is no objection, the creditors may direct a general composition, which is the most simple; but if any creditor objects, he has the right to a vote by the separate classes of creditors. *Id.*
 63. **CONFIRMATION.**—The court, before confirming the composition, should see that it works no injustice to any class of creditors, and if it does, should give redress accordingly. *Id.*
 64. **SECOND COMPOSITION MEETING.**—As a general rule a bankrupt should abide by the decision of a composition meeting duly held; but if it clearly appears that the object of the meeting failed by reason of the mistakes or mis-instructions of attorneys for creditors, the court may order a second meeting. *In re McDowell*, 193.
 65. **DEBT CREATED BY FRAUD**—is not discharged in bankruptcy, even though reduced to a simple judgment for money, in which there is no mention of fraud; if the original action was based upon fraud, the fraud is not merged in the judgment. *Warner vs. Cronkhite*, 458.
 66. **EFFECT OF AGREEMENT NOT TO ARREST.**—A stipulation between the parties after the judgment, by which the plaintiff waived his right to execution against the body of defendant, does not affect this question of discharge. *Id.*
 67. **MASSACHUSETTS INSOLVENT LAW**, and many cases commented on and distinguished. *Id.*
 68. **LIEN OF EXECUTION IN BANKRUPTCY.**—The lien of an execution will be respected by the bankruptcy court, though the plaintiff sued out his execution immediately upon the rendering of the judgment, and the defendant filed his bankruptcy on the same day. The creditor has a right to follow all the remedies which the law gives him. *Witt vs. Hereth*, 474.
 69. **CONSIGNOR—LIEN.**—A consignor whose property was sold prior to the bankruptcy, and the proceeds mingled with the general assets, has no lien or specific claim against the estate; he can only share with the other creditors. *In re Coan & Ten Broeks Mfg Co.*, 315.
 70. A certificate of membership in a Board of Trade is not an asset which passes to the assignee in bankruptcy. *In re Southerland*, 526.
 71. **CAPITAL STOCK IS TRUST FUND.**—The capital stock of a moneyed

BANKRUPTCY—Continued.

corporation constitutes a trust fund for the payment of its debts, and its officers have no right to make a dividend unless there are actual profits over and above all losses. *Main vs. Mills*, 98.

72. **OFFICER CHARGEABLE WITH KNOWLEDGE—UNLAWFUL DIVIDENDS.**—An officer of the corporation is bound to know the condition of its affairs, and has no right to receive a dividend unless legitimately earned; if he does, it may be recovered by the assignee in bankruptcy. *Id.*
73. **DIVIDENDS—WHEN UNLAWFULLY MADE.**—In deciding whether a dividend was rightfully made, the transaction must be viewed from the stand-point of that time, and in the light of subsequent events. Notes or overdrafts by persons then considered abundantly good should not be counted as losses, because they afterwards proved such. *Id.*
74. **STATUTE OF LIMITATIONS**—does not begin to run in such a case, until the fraud is discovered by the assignee. *Id.*
75. The general statute of limitations of Wisconsin does not apply to such a case, but it is controlled by §35, chap. 138, R. S. of 1858. *Id.*
76. **STATUS OF ASSIGNEE.**—The assignee, for the purpose of this suit, stands precisely in the position of the corporation itself, and has no greater rights, nor does it make any difference whether there were but two stockholders or a larger number. *Id.*
77. **POSSESSION OF PARTNERSHIP ASSETS.**—A solvent partner has no right to the possession of partnership assets in the hands of an assignee under an adjudication against the remaining members of the firm. *In re Shanahan & West*, 39.
78. **RIGHTS OF GUARANTOR IN FIRM ASSETS.**—A person guarantying the notes of a firm, and contracting for an interest in the firm property after payment of its indebtedness, takes subject to the rights of the creditors, and the crediting up by the firm to each member of his interest, does not affect the rights of the creditors in the fund in the hands of the assignee. *Id.*
79. **JUDICIAL COGNIZANCE OF INSOLVENCY.**—If these guarantied notes are unpaid and proved against the estate, the court will take judicial cognizance of that fact as negating the solvency of the guarantor. *Id.*
80. **HOMESTEAD.**—Where a conveyance of the homestead, executed by a bankrupt and his wife, has been set aside at the suit of the assignee in bankruptcy, the homestead rights remain and the assignee holds subject to them. *McFarland vs. Goodman*, 111.
81. **DECREE—PRIVITY.**—A decree declaring such conveyance fraudulent and void, and requiring the defendant to convey to the assignee, does not establish title in the assignee under such defendant, nor any privity between them. *Id.*
82. **ESTOPPEL.**—The conveyance by the bankrupt and wife works no

BANKRUPTCY—Continued.

- estoppel in favor of the purchaser from the assignee, and he has no title to support ejectment. *Id.*
88. DOWER AND HOMESTEAD RIGHTS—are governed by the same rules and principles. *Id.*
89. JOINT AND SEPARATE ESTATE.—When a debt from one partner to a bankrupt firm was incurred by the consent or privity of the other partners, proof of the joint creditors against the separate estate will not be admitted in a court of bankruptcy. *In re McEwen & Sons*, 294.
90. SECTION THIRTY-SIX OF THE BANKRUPT ACT CONSTRUED.—When all the assets of a bankrupt firm are expended in the payment of costs, and there is no fund to be divided among the firm creditors, the firm and individual creditors must be paid *pari passu* out of the separate estate of each partner. *Id.*
91. The fund applicable to and used in the payment of costs does not constitute a joint estate within the fair meaning of the Bankrupt Act. *Id.*
92. STOCK NOTES IN INSOLVENT COMPANY—SET-OFF.—A stockholder in an insurance company rendered insolvent by a fire cannot escape his liability on a stock-note, by presenting a certificate of indebtedness on one of the adjusted policies and withdrawing his note. *Jenkins vs. Armour*, 312.
93. TRUST FUND.—Such a note constitutes a trust fund for the benefit of the creditors of the company, and the transaction is in effect a conversion of the company assets. *Id.*
94. INTEREST.—The stockholder must pay interest from the date of the withdrawal of his stock-note. *Id.*
95. BOND BY PARTNERS—DISTRIBUTION.—A claim on a bond signed individually by the members of a firm, but not for a firm debt or obligation, is not entitled, as against partnership creditors, to be paid in bankruptcy from the partnership assets. It is a joint, but not a partnership debt. *In re Roddin & Hamilton*, 377.
96. ERROR IN CHARGE.—Where error in a charge relates to a matter which might have been corrected on the spot, if the attention of the court had been called to it, the party failing so to do cannot take advantage of the error on motion for new trial. *Hamlin vs. Pettibone*, 167.
97. The amendment of June 23, 1874, to the Bankrupt Act does not affect cases commenced before Dec. 1, 1873, nor does the repealing clause affect suits by assignees then pending. The amendments are not inconsistent with the original act, except as to cases commenced since Dec. 1, 1873. *Id.*
98. REPEALS BY IMPLICATION, OR BY GENERAL CLAUSE—are never favored, and are never extended beyond their necessary operation. *Id.*
99. TIME—VESTED RIGHTS.—In cases where no other time is mentioned the amendment only applies to cases arising after its passage. Congress did not intend to validate contracts void under the original

BANKRUPTCY—Continued.

- act, or to affect contracts theretofore made, or the substantial rights of parties acquired under the original law. *Id.*
95. The substitution of "knowing," for "having good reason to believe" is merely a verbal one, inapplicable to most cases. Notice of facts sufficient to put a person upon inquiry amounts in law to knowledge of the facts which inquiry would have developed. *Id.*
96. NOTICE OF FINAL MEETING OF CREDITORS.—A notice to creditors that a meeting would be held at a specified time and place for the purposes named in the 27th section of the Bankrupt Act, and that a final dividend would be declared, is a sufficient notice to authorize such meeting, to make a final disposition of the estate. *In re Merchants' Ins. Co.*, 252.
97. ASSIGNEE'S ACCOUNTS.—Where the assignee's accounts and vouchers have been filed with the register, a reasonable time before such final meeting, the meeting may by vote properly dispense with the reading of them, and the exhibition of the vouchers, nor have individual creditors the right then to insist upon such reading or exhibition. *Id.*
98. PARLIAMENTARY LAW.—In the absence of specific provisions of law on any point, creditors' meetings are properly guided by the rules and usages of parliamentary bodies. *Id.*
99. ACTION OF CREDITORS' MEETING.—A creditors' meeting has no power over the accounts or fees of the assignee, but if the register submits them to such a meeting, their action will be regarded by the register and court, unless there exist grave reasons to the contrary. *Id.*
100. EXTRA ALLOWANCE TO ASSIGNEE.—The register has no authority to allow an extra compensation to the assignee, even after a vote by the creditors' meeting. The proper practice is to apply to the court for such extra allowance previous to the final meeting. *Id.*
101. DISCHARGE SINCE AMENDMENT OF JUNE 22, 1874.—In cases commenced before above date both voluntary and involuntary bankrupts may be discharged without reference to the amount of their assets, or the number of creditors assenting. *In re Perkins*, 185.
102. DEBTS SHOULD BE CLASSED AS OF DATE OF CONTRACTION.—A renewal note is but an evidence of the debt, and the bankrupt should be allowed to show when it originated; and if before January 1, 1869, it should be classed as a debt contracted before that date. *Id.*
103. LIABILITY OF PRINCIPAL TO SURETY—must be considered as having been contracted when the instrument was signed, not when the surety made payment. *Id.*

BILLS—See NOTES, BILLS, CHECKS, 1-5.

BONA FIDE HOLDER—See MUNICIPAL BONDS, 5.

BONDS—See MUNICIPAL BONDS, 61.

BROKER—See BANKRUPTCY, 56-59.

BURDEN OF PROOF—See EVIDENCE, 4.

CAPITAL STOCK—*See* BANKRUPTCY, 71.

CERTIORARI—*See* REMOVAL FROM STATE COURTS, 1, 21.

COMPARISON OF HANDWRITING—*See* EVIDENCE, 10.

COMPROMISE AGREEMENT.

1. **A SECRET AGREEMENT**—To pay one creditor or his agent a larger sum than was to be paid others, as a condition of accepting the compromise, is void, and if the creditor's agent was specially retained by the debtor to urge the compromise, any promise to pay the agent for such services is void. *Bullens vs. Blain*, 22.
2. **EQUALITY IN COMPROMISE SETTLEMENTS.**—It is the policy of the law to discourage all acts whereby one creditor obtains an advantage in the distribution of a debtor's estate, and if the agent of a creditor is authorized to accept compensation from debtors for securing compromises, in which compensation the creditor upon certain conditions was to share, no contract between the agent and the debtor for such compensation should be enforced. *Id.*
3. **SETTLEMENT WITH CREDITORS—PREFERENCE—MISREPRESENTATIONS.**—Where a debtor who has made a settlement with his creditors, seeks to recover a certain sum paid by him to one creditor, above the percentage paid to others, it is a good answer that the settlement was obtained by misrepresentation, and that the debtor concealed a valuable portion of his assets. *Armstrong vs. Mechanics' National Bank*, 520.

CONDEMNATION—*See* JURISDICTION, 21.

CONFLICT OF JURISDICTION—*See* JURISDICTION.

1. **BANKRUPTCY COURT—WHEN SUPREME.**—When the bankrupt law cannot be properly administered by the bankruptcy court, owing to the interference of a state court and its determination to adjudicate upon the rights of parties and property in the bankruptcy court, then the latter ought not to hesitate to assert its authority. *In re Miller*, 80.
2. In questions under the Bankrupt Act, the federal and state courts are not independent, but the former are superior. *Id.*
3. **STATE TRIBUNALS BOUND.**—A decision by the bankruptcy court that a transfer was in fraud of the act is binding upon the state courts, and the creditor must come into the bankruptcy court to assert his rights as against such decision. *Id.*
4. **ENJOINING SUIT IN STATE COURT.**—If, however, he sue the marshal and the assignee in trespass in a state court, the bankruptcy court may enjoin the parties to the suit. *Id.*
5. **PRIORITY.**—It is the settled rule of law that the court which first takes cognizance of the controversy is entitled to retain jurisdiction to the end of the litigation, and to take possession and control of the subject-matter of the litigation, to the exclusion of all interference from other courts of co-ordinate jurisdiction. *Union Trust Co. vs. R., R. I. & St. L. R. R. Co.*, 197.

CONFLICTING JURISDICTION—Continued.

6. **POSSESSION OF THE RES.**—This rule does not require that the court first taking jurisdiction of the case shall also first take possession of the property; and a prior seizure from another court does not give priority of jurisdiction. *Id.*
7. **POWER OF COURT OVER JUDGMENT**—to set aside, modify or annul, is unlimited during the term at which they were rendered. *Id.*
8. Where a demurrer to a bill is sustained and bill dismissed, the court may, during the term, set aside its dismissal and restore the case without losing its jurisdiction, and a state court cannot, by taking jurisdiction during this interval, oust or supersede the jurisdiction of this court. The case stands precisely as though no order of dismissal had been made. *Id.*
9. **REFUSAL TO RESUME JURISDICTION.**—The cases where courts have refused to set aside their judgment and proceed with the case, in order to protect their parties acting in good faith, are cases of equitable discretion, not of right, and do not contravene the rule. *Id.*
10. **PRIORITY.**—The court which first takes jurisdiction of a controversy and the parties, is entitled to retain it to its final termination, and also to take possession of the *res*, subject of the controversy, exclusive of all interference from any other court of concurrent jurisdiction; and it is not essential that the court first taking jurisdiction of the controversy should also first take the actual possession of the *res*. *Gaylord vs. Ft. W., M. & C. R. R. Co.*, 286.
11. **PRIORITY OF POSSESSION.**—If a receiver appointed by another court on bill filed pending this controversy, takes prior possession of the *res*, his possession is wrongful and should give way to the prior jurisdiction of this court. *Id.*
12. **BANKRUPTCY SUPERSEDES CREDITOR'S BILL.**—Proceedings in bankruptcy supersede a creditor's bill in a state court; a receiver appointed by the state court can be compelled to deliver the property over to the assignee in bankruptcy, subject to all the rights which the creditors whom he specifically represents have obtained, and to all the priorities which they have obtained by their diligence. *In re Whipple*, 516.

CONSIDERATION.

1. **INADEQUACY.**—Claims against an estate for \$400,000, founded on a consideration of less than \$19,000, are grossly inequitable and unjust, and should not be allowed. *Ex parte Young*, 58.
2. A "put" cannot be sustained, as being a measure of insuring prices, when such is not shown to have been the intent of the parties. *Id.*

CONSIGNOR'S LIEN.

- CONSIGNOR—LIEN.**—A consignor whose property was sold prior to the bankruptcy, and the proceeds mingled with the general assets, has no lien or specific claim against the estate; he can only share with the other creditors. *In re Coan & Ten Broeks Mfg Co.*, 315.

CONSPIRACY—See REVENUE LAW, 1-6.
CONSTITUTIONAL LAW.

1. **LIMITATIONS.**—The Wisconsin Limitation Act of April 8, 1872, so far as it affects municipal bonds, issued before its passage, is unconstitutional and void. *Perceles vs. City of Watertown*, 79.
2. In passing a statute of limitations, the Legislature must allow a reasonable time within which to prosecute existing causes of action; and as to what constitutes such reasonable time, the Legislature is not the exclusive authority. The period fixed by the Legislature is subject to review by the courts, and if they deem it unreasonable, they will disregard it as impairing the obligation of contracts. *Id.*
3. A limitation to one year in municipal bonds issued for negotiation in a foreign market, is clearly unreasonable and unconstitutional. *Id.*
4. **RIGHT OF WAY.**—It is beyond the power of Congress to authorize a telegraph company to construct its line over private property without making compensation. *A. & P. Telegraph Co. vs. C., R. I. & P. R. R. Co.*, 158.
5. **JURISDICTION.**—The United States Circuit Court has jurisdiction of a bill by non-resident creditors to restrain the railroad commissioners from actions injurious to their rights. It is not necessary to wait until the commissioners have taken positive action. *Pick vs. C. & N. W. R. R. Co.*, 177.
6. Acts of March 12, 1874, do not repeal the Act of March 11, 1874. *Id.*
7. **ALTERING WISCONSIN RAILROAD CHARTERS.**—The provision of the Wisconsin Constitution, that railroad charters "may be altered or repealed by the Legislature at any time after their passage" underlies all the grants of rights and franchises to the Northwestern Railway Company, and all its stock and securities were taken and are held subject to this paramount condition, of which in law all holders had notice. *Id.*
8. **RIGHTS OF CREDITORS.**—The corporation cannot clothe its creditors with greater rights, as against the state, than it possesses itself; and this principle is not changed by authority from the Legislature to consolidate with other roads. *Id.*
9. The Wisconsin Legislature has the power to regulate railroad charges for transit of persons and property within the state, and the fact that the exercise of such power might affect the value of the railroad's property and franchises, cannot touch the question of the power. *Id.*
10. **CONGRESSIONAL GRANTS OF LAND TO THE STATE** cannot change the rights of the corporation or its creditors. *Id.*
11. **CONDITIONS IMPOSED ON FOREIGN CORPORATIONS.**—A state allowing a foreign corporation to do business within its limits, may impose such reasonable conditions as it sees fit. *Payson vs. Withers*, distinguished. *Lamb vs. Lamb*, 420.
12. **WISCONSIN STATUTE PROHIBITING NON-RESIDENT CORPORATIONS FROM REMOVING SUIT INTO FEDERAL COURTS.**—The Wisconsin

CONSTITUTIONAL LAW—Continued.

statute of March 14, 1870, that no non-resident corporation should remove a suit from the state to the Federal courts, having been declared unconstitutional by the United States Supreme Court, the provision of the statute of April 5, 1872, requiring the Secretary of State to revoke the license of any such corporation applying for such removal falls with it. *Hartford Fire Insurance Co. vs. Doyle*, 461.

13. JURISDICTION OF UNITED STATES CIRCUIT COURT.—The United States Circuit Court can in such case grant an injunction restraining the Secretary of State from attempting to forfeit the license.
14. CITY TAX AGAINST VESSEL NOT DUTY OF TONNAGE.—The assessment, of a vessel owned in a city, by the city assessor, for city taxes, is not a "duty of tonnage" within the meaning of the United States Constitution, Article I., §10, first clause. *The North Cape*, 505.

COPYRIGHT.

1. TRANSLATIONS OF PLAYS.—Where the translator of a play, by consent of the author, has obtained a copyright upon it, the owner of such copyright can maintain a bill enjoining any other person from using or representing such translation or any part of it. *Shook vs. Rankin*, 477.
2. PRACTICE.—Affidavits, evidently intended to be used in a case, but not entitled in it, will be allowed to be read on motion for injunction. *Id.*

CORPORATION.—See MUNICIPAL BONDS—INSURANCE, 14—BANKRUPTCY, 10-14.

COSTS.—See BANKRUPTCY, 34.

CREDITOR'S BILL.—See BANKRUPTCY, 9.

CRIMINAL LAW.—See REVENUE LAW, 1-6.

1. LIST OF WITNESSES FOR ACCUSED.—In all criminal cases in which there has been no preliminary examination, it is within the discretion of the court to order a list of the witnesses sworn before the grand jury, to be furnished to the accused. *U. S. vs. Southmayd*, 321.
2. MINUTES OF GRAND JURY.—He is not, however, entitled to the minutes of the proceedings before the grand jury, nor, in the absence of strong reasons to the contrary, should they be furnished him. *Id.*
3. INDICTMENT—VARIANCE.—Where an indictment for receiving stolen goods charges that the accused received the goods from the principal felon, and the proofs show that they were received from a person to whom the thief had delivered them, the variance is fatal. *U. S. vs. De Barre*, 358.
4. WHEN THE CHARACTER OF STOLEN PROPERTY CEASED.—In a prosecution for receiving stolen postage stamps, the proof was that the thief deposited them in an express office directed to the defendant, and after arrest gave a written order for the property to a postmaster, who took them, and subsequently, by order of the postoffice department, re-deposited them in the express office, and they were for-

CRIMINAL LAW—Continued.

warded to the defendant, who received them. *Held*, that the character of the stamps as stolen property ceased in the hands of the postmaster, and that there could be no conviction. *Id.*

DAMAGES—See ADMIRALTY, 11.

DEBTOR AND CREDITOR—See COMPROMISE AGREEMENT.

DISCHARGE—See BANKRUPTCY, 59-65, 101.

DISTILLERS—See REVENUE LAW, 1.

DISTRIBUTION OF PROCEEDS—See ADMIRALTY, 17.

DIVIDENDS—See BANKRUPTCY, 73.

DIVORCE.

1. **IMPEACHING DECREE**.—Fraud upon a party by her counsel in a state court will not invalidate a decree where it does not satisfactorily appear that it altered the result. *Amory vs. Amory*, 174.

DOWER—See BANKRUPTCY, 83.

ESTOPPEL—See BANKRUPTCY, 82.

1. **HUSBAND AND WIFE**.—The wife having allowed her husband to enjoy the credit of her securities and their proceeds, cannot afterwards claim them as against creditors who have trusted him on the faith of such apparent ownership. *In re Jones*, 68.
2. If she joins him when embarrassed in conveying his property to their children, making no claims for herself, she cannot afterwards set up a claim when such conveyances are about to be set aside. *Id.*
3. **JUDGMENT IN ANOTHER STATE**.—In assumpsit upon a promissory note, the bar of a judgment in another state upon the same note is not avoided by the record of an action upon that judgment to which the defendant pleaded *nul tiel record*, and in which action plaintiff took a non-suit. The plea of the judgment is good, there is no estoppel, and the second record is not admissible in evidence. *Michigan Insurance Bank vs. Eldred*, 370.
4. Doctrine of estoppels considered.
5. **CONDITION OF TITLE**.—Though an insurance policy provides that if the property is leasehold, or held otherwise than by absolute ownership, it must be so represented to the company and expressed in the policy, or the insurance will be void, yet if at the time of issuing the policy the agent of the company knew the actual condition of the title to the property, and failed or neglected to make the proper note in the policy, it cannot be avoided on that ground. *Field vs. Insurance Co., of N. A.*, 121.

EVIDENCE.

1. **HUSBAND NOT COMPETENT WITNESS**.—In Wisconsin the husband is not competent as a witness for his wife; this incompetency rests on grounds of public policy, and is not removed by the statute removing the disqualification of interest. *In re Jones*, 68.
2. **CREDIBILITY OF WIFE'S TESTIMONY**.—Where this is defective and

EVIDENCE—Continued.

- contradictory, particularly about the most material matters, her statements as to the amount of her claim should be looked upon with suspicion. *Id.*
8. **WIDOW—PROOF OF HEIRSHIP.**—A woman claiming an estate from a man as his widow and heir-at-law, required in this case to give satisfactory proof, independent of her own statement, that she was actually the wife of the deceased. *Amory vs. Amory*, 174.
4. **BURDEN OF PROOF**, is upon an insurance company to show that over-valuation complained of was intentional. *Field vs. Ins. Co., of N. A.*, 121.
5. **MUNICIPAL BONDS.—LETTERS BETWEEN THIRD PARTIES.**—engaged in negotiating municipal bonds are not competent evidence to impeach them in the hands of parties claiming to be *bona fide* holders, unless they are shown to have had some connection with such letters. *Kennicott vs. Supervisors of Wayne Co.*, 138.
6. **PROOFS BEFORE MASTER.**—Under an order requiring claimants upon bonds to appear before a master and prove their claims, a presentation of the bonds by an agent or attorney is sufficient, though the proofs were taken in another state, if no suspicion has been thrown upon the *bona fides* of the bonds. *Id.*
7. **BONA FIDE HOLDER—PRESUMPTION.**—Upon the presentation of a negotiable bond the presumption of law is that the person presenting is a *bona fide* holder, and until evidence is introduced tending to negative that presumption, he is under no obligation of proving himself a *bona fide* holder. *Id.*
8. **COMPARISON OF HANDWRITING.**—A party has no right to an instruction to the jury, allowing them to take to the jury-room a letter, the genuineness of which is denied, for the purpose of comparing it with a genuine letter; such comparison is only permissible during the progress of the trial. *Howell vs. Hartford Fire Insurance Co.*, 163.
9. **PROOF OF WAIVER.**—Less strictness of proof is required to establish a promise by the debtor *before* the bar of the statute has attached, than to prove a new promise *after* the debt has become barred. *In re Reed*, 250.
10. **LETTERS TO THIRD PARTIES.**—Letters written by the bankrupt debtor to third parties, admitting the payment of a claim, are admissible in evidence in a contest between attaching and petitioning creditors, where the former attempt by interposing such claim to defeat adjudication. *In re Hutje*, 436.

EXECUTION.—See BANKRUPTCY, 68.**EXEMPTION.—See BANKRUPTCY**, 80-83.

1. **EXEMPTIONS.**—A debtor is entitled to the full benefit of the exemptions allowed by the bankrupt act, even though an execution had become a perfected lien upon his property before the filing of the petition. *In re Owens*, 432.

EXEMPTION—Continued.

2. **COSTS.**—In Indiana, a judgment for the costs of the opposite party is not a debt growing out of a contract, express or implied, and as against such costs the statute does not allow exemptions. *Id.*

FORCIBLE ENTRY AND DETAINER.

1. **JURISDICTION.**—Since the Illinois statute of February 16, 1874, the U. S. Circuit Courts in that state have in proper cases jurisdiction of actions of forcible entry and detainer. *Wheeler vs. Bates*, 88.
2. Such action is a "suit of a civil nature" within the meaning of the act of Congress of 1789. *Id.*

FORECLOSURE.

1. **SALE AT OLD COURT HOUSE DOOR AFTER CHICAGO FIRE.**—Where a trustee's sale was made after the Chicago fire of October 9, 1871, at the north door of the (old) court house, the place specified in the trust deed, a subsequent purchaser is not bound to look beyond the recitals in the regular trustee's deed. *Long vs. Rogers*, 416.
2. **BANKRUPTCY OF SUBSEQUENT MORTGAGEE** is no objection to the execution of the power of sale in the prior incumbrance. *Id.*

FRAUD—See BANKRUPTCY, 65.

1. **IMPEACHING DECREE.**—Fraud upon a party by her counsel in a state court will not invalidate a decree where it does not satisfactorily appear that it altered the result. *Amory vs. Amory*, 174.

FRAUDULENT PREFERENCE—See BANKRUPTCY, 52.**GAMING CONTRACTS—See WAGER CONTRACTS.****GUARANTOR.**

1. **WHEN CANNOT PROVE DEBT.**—The guarantors of a note, the holder of which had forfeited his claim against a bankrupt estate, have no right to prove against the estate, their liability having already been discharged by the act of the principal. *In re Shanahan & West*, 89.
2. **PARTICEPS CRIMINIS.**—If the guarantors participated in the act by which their principal forfeited his claim, they occupy no better position, and cannot prove. *Id.*
3. **PREFERENCE—RELEASING GUARANTOR.**—Where the holder has taken a preference in fraud of the Bankrupt Act, and a recovery has been had against him by the assignee, payment of the judgment does not revive his right to prove against the estate; and by such preference he has released the guarantors, and they have no claim against the estate. *Id.*
4. **REVIVING LIABILITY.**—*It seems*, that a guarantor, not legally liable to the holder, cannot, by any subsequent promise, revive the liability of the estate. *Id.*

HANDWRITING—See EVIDENCE, 8.**HOMESTEAD—See BANKRUPTCY, 80-83.****HUSBAND AND WIFE—See MARRIED WOMEN.****INADEQUACY OF CONSIDERATION—See CONSIDERATION.**

INFRINGEMENT—*See* PATENTS.

INJUNCTION—*See* PATENTS—RAILROAD COMPANIES—COPYRIGHT.

INSURANCE.

1. **RENEWAL OF POLICY—AUTHORITY OF SOLICITOR.**—The insurance solicitor has no authority, simply from the nature of his business, to bind the company to a waiver of payment of the premium. *Hambleton vs. Home Insurance Co.*, 91.
2. **WAIVER, HOW SHOWN.**—Where by the terms of the policy a renewal is not binding unless the renewal premium be paid, the assured, claiming a waiver, must show either an express agreement to that effect or one arising by necessary implication from the facts and circumstances. *Id.*
3. **WAIVER, WHAT CONSTITUTES.**—Where the partner of the agent of the assured tells the solicitor that if he will carry the risk and send him the bill, he will pay it, and the solicitor answers "All right," and afterwards presents the bill at the agent's office, of which he has notice, but makes no effort to pay it, the whole transaction being neither reported to the regular agents of the company nor entered upon their books, there is no consummated contract of renewal, and no waiver of the payment of the premium. *Id.*
4. **OVER-VALUATION FOR INSURANCE.**—A provision in a policy that "if the insured shall cause the property to be insured for more than its value, the policy shall be void," only avoids the policy in case of intentional over-valuation or fraudulent concealment. This is particularly true where an agent of the company was requested to examine the property, or had an opportunity so to do. *Field vs. Insurance Co. of N. A.*, 121.
5. **BURDEN OF PROOF** is upon the company to show that the over-valuation was intentional. *Id.*
6. **CONDITION OF TITLE—ESTOPPEL.**—Though the policy provides that if the property is leasehold, or held otherwise than by absolute ownership, it must be so represented to the company and expressed in the policy, or the insurance will be void, yet if at the time of issuing the policy the agent of the company knew the actual condition of the title to the property, and failed or neglected to make the proper note in the policy, it cannot be avoided on that ground. *Id.*
7. **PROOFS OF LOSS.**—If these are presented in apt time, and are substantially in compliance with the requirements of the policy, that is sufficient, unless the company asks for more specific proof. *Id.*
8. **WAIVER OF PROOFS.**—If the adjuster of the company, after examining the premises, stated to the insured that the company was not liable, on the ground of the invalidity of the policy, such facts may be considered as a waiver of the proofs of loss. *Id.*
9. **OWNERSHIP OF INSURED PROPERTY.**—If the property was insured as belonging to the wife, and the ownership lies between the husband and wife, and the former is estopped from claiming it, then the title is sufficient in the wife to support the action on the policy. *Id.*

INSURANCE—Continued.

10. **VALUE** of insured property is for the jury to determine. *Id.*
11. **INTEREST** may be allowed after the expiration of sixty days from the furnishing of proofs of loss. *Id.*
12. **SUICIDE—INSANITY.**—It is competent for an insurance company to restrict its liability by a clause avoiding liability "in case of the death of the insured by his or her own act or intention, whether sane or insane," and in such case no degree of insanity will avoid the condition. *Chapman vs. Republic Life Insurance Co.*, 238.
13. **INTENTION.**—The words "act" and "intention" mean the same as the word "act" alone, for act implies intention. *Id.*
14. **PREMIUM NOTE—FOREIGN CORPORATIONS.**—It is a good defense to a premium note to a mutual insurance company of another state, that the note was given in Indiana to an agent of the company, the company not having complied with the Indiana statute respecting foreign corporations. Mutual insurance companies are clearly within the statute. *Lamb vs. Lamb*, 420.
15. **CONDITIONS IMPOSED ON FOREIGN CORPORATIONS.**—A state allowing a foreign corporation to do business within its limits, may impose such reasonable conditions as it sees fit. *Payson vs. Withers*, distinguished. *Id.*
16. **ASSESSMENT BY COURT DOES NOT ESTABLISH VALIDITY OF NOTE.**—The order of assessment by the bankruptcy court does not bind the maker as to the validity of the note—his defense to the note can be heard when action is brought upon it. *Id.*

INSURANCE COMPANIES—See REMOVAL FROM STATE COURTS.—
CONSTITUTIONAL LAW, 11—18—BANKRUPTCY, 7, 54, 71, 87.

INTEREST.

1. A stockholder in an insolvent insurance company must pay interest from the date of the withdrawal of his stock-note. *Jenkins vs. Armour*, 312.
2. **INTEREST** may be allowed after the expiration of sixty days from the furnishing of proofs of loss to an insurance company. *Field vs. Insurance Co. of N. A.*, 121.

INTERNAL REVENUE—See REVENUE LAW.

JUDGMENT—See PLEADING, 8.

JURISDICTION.

1. **SUITS BY ASSIGNEES.**—The United States Circuit Court has jurisdiction of a bill by an assignee to recover money or property of the bankrupt preferentially or fraudulently conveyed. *Flanders vs. Abbey*, 16.
2. A **NATIONAL BANK** cannot be sued in the federal courts outside of the district where it is located. Service on the cashier when found within another district does not give jurisdiction. *Main vs. Second National Bank of Chicago*, 26.
3. *Manufacturers' National Bank vs. Baack*, 8 Blackford, 137, approved.

JURISDICTION—Continued.

4. The Practice Act of June 1, 1872, does not change this rule nor enlarge the jurisdiction of the federal courts. *Id.*
5. JURISDICTION OVER CORPORATION IN HANDS OF RECEIVER.—The amendment of February 8, 1878, to the Bankrupt Act, does not deprive the bankruptcy courts of jurisdiction over a corporation of which a receiver had been appointed by a state court. *In re National Life Insurance Co.*, 85.
6. This amendment does not oust the federal courts of jurisdiction, but simply saves the acts done by the state court and receiver prior to the filing of the petition. *Id.*
7. FORCIBLE ENTRY AND DETAINER.—Since the Illinois statute of February 16, 1874, the U. S. Circuit Courts in that state have in proper cases jurisdiction of actions of forcible entry and detainer. *Wheeler vs. Bates*, 88.
8. Such action is a "suit of a civil nature" within the meaning of the act of Congress of 1789. *Id.*
9. CERTIORARI.—The United States Circuit Court has no jurisdiction of a writ of *certiorari* to a state court for the removal of proceedings by the state against a railroad company under the Illinois act of May 2, 1873. *State of Illinois vs. C. & A. R. R. Co.*, 107.
10. The United States Circuit Court has jurisdiction of a bill by non-resident creditors to restrain the railroad commissioners from actions injurious to their rights. It is not necessary to wait until the commissioners have taken positive action. *Pick vs. C. & N. W. R. R. Co.*, 177.
11. CORPORATIONS.—A corporation created by the laws of another state, although associated with one of this state, and having common interest with it, is entitled to file a bill in this court and claim its protection. *C. & N. W. R. R. Co. vs. C. & P. R. R. Co.*, 219.
12. AMENDMENT OF JUNE 22, 1874, RETROACTIVE.—An amendment of a petition in bankruptcy to bring it within the amendment of June 22, 1874, is retroactive, and gives effect to action of the court taken on the original petition. *In re Williams & McPheeters*, 283.
13. The amendment took effect on the beginning of the day it was approved, and operates upon a petition filed during the day. *Id.*
14. CONSTRUCTION.—The amendment should be reasonably construed, if possible, so as not to destroy or impair any proceedings already commenced, or commenced in good faith in ignorance of its passage. *Id.*
15. Irregularities in the bankruptcy proceedings do not deprive the court of its jurisdiction over the bankrupts and their estate, nor justify creditors in proceeding in the state courts. *Id.*
16. JURISDICTION.—A statement in the declaration filed in the state court, of facts which would, if true, prevent the discharge of the debt in bankruptcy is not binding upon the bankrupt court, nor does it pre-

JURISDICTION—Continued.

vent the full jurisdiction of that court over the person and estate of the bankrupt. *Id.*

17. **INFORMATION—SEIZURE ESSENTIAL TO JURISDICTION.**—In cases of information an actual seizure of the *res*, prior to the filing of the libel, is essential to the jurisdiction of the federal courts. *The Tug May*, 243.
18. United States Statutes and decisions of the Supreme Court commented upon. *Id.*
19. **SEIZURE, WHO SHOULD MAKE.**—The Secretary of the Treasury may authorize any United States officer to make the seizure; and in the absence of such authority, it is the duty of the customs officers. *Id.*
20. **CONDEMNATION PROCEEDINGS.**—A proceeding under the right of eminent domain to condemn land for a railroad is not a case in which the state is a party, and the federal courts may have jurisdiction. Nor is it a special proceeding, nor can the right of removal be limited by state laws. It is in effect a suit of civil nature, and and if the parties are competent, comes under the United States statutes for removal of causes. *Warren vs. Wisconsin Valley R. R. Co.*, 425.

LACHES—See ADMIRALTY, 5.

1. If, soon after decree, the party has knowledge of facts calculated to throw suspicion upon the conduct of her counsel, she is bound to use due diligence in inquiring and in seeking relief, and a delay of eleven years bars any relief against the decree and the consequences of the fraud alleged. *Amory vs. Amory*, 174.

LETTERS—See EVIDENCE, 10.**LIEN OF EXECUTION—See BANKRUPTCY, 68.****LIMITATIONS—See ADMIRALTY, 6.**

1. The Wisconsin Limitation Act of April 8, 1872, so far as it affects municipal bonds, issued before its passage, is unconstitutional and void. *Perles vs. City of Watertown*, 79.
2. In passing a statute of limitations, the Legislature must allow a reasonable time within which to prosecute existing causes of action; and as to what constitutes such reasonable time, the Legislature is not the exclusive authority. The period fixed by the Legislature is subject to review by the courts, and if they deem it unreasonable, they will disregard it as impairing the obligation of contracts. *Id.*
3. A limitation to one year in municipal bonds issued for negotiation in a foreign market, is clearly unreasonable and unconstitutional. *Id.*
4. **STATUTE OF LIMITATIONS**—does not begin to run, as against the assignee in bankruptcy until the fraud is discovered by the assignee. *Main vs. Mills*, 98.
5. The general statute of limitations of Wisconsin does not apply to such a case, but it is controlled by §35, chap. 183, R. S. of 1858. *Id.*
6. **HEIRS.**—Where a debtor had filed a petition in bankruptcy, his only

LIMITATIONS—Continued.

debts being apparently barred by the statute of limitations, his widow and heirs cannot procure a withdrawal of the property from the bankruptcy court, even though no debts had been proved against the estate. They may have been taken out of the statute, and if provable at the time of filing the petition they would not be barred subsequently. The statute ceases to run on the filing of the petition. *In re Wright*, 317.

7. **DELAY OF CREDITORS.**—The heirs of the bankrupt cannot profit by delay of creditors in proving their debts; and the widow of an intestate has no possible standing in court, her dower claim not passing to the assignee. *Id.*

8. In Wisconsin, a demand barred by the statute of limitations is not provable against the estate of a bankrupt. *In re Noesen*, 443.

MANDAMUS.

1. **RETURN TO MANDAMUS—AUDITING JUDGMENT.**—Where town officers had resigned in order to avoid auditing and paying a judgment against the town, it is not a sufficient return to an alternative writ of *mandamus* that the respondents, the officers, had resigned. If it does not also appear that their successors have been elected, or appointed, and qualified, they will be ordered to audit the judgment. And it *seems* that they may be ordered to hold a special meeting for that purpose. *U. S. vs. Badger*, 308.

MARITIME LIENS—See ADMIRALTY.**MARRIED WOMEN.**

1. **CHARGING ESTATE OF MARRIED WOMAN.**—In Wisconsin a married woman, by simply indorsing a note, does not create a liability which can be enforced against her separate estate, nor one upon which a personal judgment will be rendered against her. *Flanders vs. Abbey*, 16.
2. **HUSBAND NOT COMPETENT WITNESS.**—In Wisconsin the husband is not competent as a witness for his wife; this incompetency rests on grounds of public policy, and is not removed by the statute removing the disqualification of interest. *In re Jones*, 68.
3. Securities taken in wife's name will not pass to her as her separate property, if they were so drawn simply for convenience; it must clearly appear that they were intended as a settlement upon her. *Id.*
4. **USED BY HUSBAND.**—Where such securities are used and collected by the husband with the wife's consent, this conduct disproves the claim that they were intended as a settlement upon her. *Id.*
5. **ESTOPPEL.**—The wife having allowed him to enjoy the credit of such securities and their proceeds, cannot afterwards claim them as against creditors who have trusted him on the faith of such apparent ownership. *Id.*
6. If she joins him when embarrassed in conveying his property to their children, making no claims for herself, she cannot afterwards set up

MARRIED WOMEN—Continued.

- a claim when such conveyances are about to be set aside. *Id.*
7. **CREDIBILITY OF WIFE'S TESTIMONY.**—Where this is defective and contradictory, particularly about the most material matters, her statements as to the amount of her claim should be looked upon with suspicion. *Id.*
 8. **TITLE OF PROPERTY DEVISED FOR DISTRIBUTION.**—Where property is willed to executors to convert into a fund, and keep and distribute, etc., the title remains in them until it is actually distributed; and where a discretion is to be exercised before a distribution, the ultimate distributee has no vested interest in the property until such discretion has been exercised. *Id.*
 9. **OPERATION OF PROPERTY ACT ON VESTED RIGHTS.**—A note given to her for money loaned by her while unmarried, and prior to the passage of the Married Woman's Property Act, passes to the husband under the common law rule, and his vested interest therein cannot be abrogated by any subsequent act of the Legislature; and though he receives the money thereon, she cannot prove the amount against him as a debt in bankruptcy. *Id.*
 10. **RECEIPT OF INCOME OF WIFE'S ESTATE.**—A married woman may bestow upon her husband the income of her separate estate; and where the husband, with the consent of the wife, is in the habit of receiving such income and profits, this shows her voluntary choice to thus dispose of them for the use and benefit of the family, and the husband will not be required to account therefor, beyond the amount received during the last year. *Id.*
 11. A claim founded upon such receipt of income and profits will not be allowed against the husband's estate. *Id.*
 12. **ACCOUNT.**—The fact that no account was kept by either party as to the money thus received, strengthens the presumption of law that there is no agreement to repay it. *Id.*

MARSHALING ASSETS.

1. **INSOLVENT CORPORATION.**—The proper remedy against an insolvent corporation when its assets are of such a nature that they cannot be levied upon and sold under execution, is a bill in equity to marshal and distribute its assets. *Irons vs. Manufacturers' National Bank of Chicago*, 801.

MORTGAGE.

1. **ROLLING STOCK.**—The provision in the Illinois Constitution of 1870, that the rolling stock of a railroad company shall be deemed personal property, does not change the rule that a mortgage made by the company, covering all after-acquired property, includes such acquired rolling stock, if obtained before the rights of execution creditors attach. *Scott vs. O. & S. R. R. Co.*, 529.

MUNICIPAL BONDS—See CONSTITUTIONAL LAW, 1-3.

1. **LETTERS BETWEEN THIRD PARTIES.**—engaged in negotiating the bonds are not competent evidence to impeach them in the hands of

MUNICIPAL BONDS—Continued.

parties claiming to be *bona fide* holders, unless they are shown to have had some connection with such letters. *Kennicott vs. Supervisors of Wayne Co.*, 188.

2. **BONDS GIVEN FOR GOODS.**—The fact that bonds were received from the treasurer of the railroad company in payment of goods, is not of itself sufficient to bar the merchant from claiming as a *bona fide* holder, if the goods were of such a character as would be of value to the company in the construction or operation of the road. *Id.*
3. **CORRECTION OF MISTAKES.**—Where a case has been to the Supreme Court, the Circuit Court, in passing upon a collateral branch of the case, will not admit that that court has made a mistake in regard to any facts which it has actually passed upon. The party moving to correct such mistake must go to the Supreme Court for relief. *Id.*
4. **PROOFS BEFORE MASTER.**—Under an order requiring claimants upon bonds to appear before a master and prove their claims, a presentation of the bonds by an agent or attorney is sufficient, though the proofs were taken in another state, if no suspicion has been thrown upon the *bona fides* of the bonds. *Id.*
5. **BONA FIDE HOLDER—PRESUMPTION.**—Upon the presentation of a negotiable bond the presumption of law is that the person presenting is a *bona fide* holder, and until evidence is introduced tending to negative that presumption, he is under no obligation of proving himself a *bona fide* holder. *Id.*
6. **TOWN OFFICERS—WHEN RESIGNATION EFFECTIVE.**—Under the Illinois township organization law, the town officers continue to be such until their successors are qualified, and resignation does not relieve them from duty and liability. *U. S. vs. Badger*, 808.
7. **RETURN TO MANDAMUS—AUDITING JUDGMENT.**—Where town officers had resigned in order to avoid auditing and paying a judgment against the town, it is not a sufficient return to an alternative writ of *mandamus* that the respondents, the officers, had resigned. If it does not also appear that their successors have been elected, or appointed, and qualified, they will be ordered to audit the judgment. And it *seems* that they may be ordered to hold a special meeting for that purpose. *Id.*

MUNICIPAL CORPORATIONS—See CONSTITUTIONAL LAW.

1. **NINTH ARTICLE ILLINOIS INCORPORATION ACT.**—To constitute an adoption of this article, it is only necessary that it be adopted by such a declaration of the municipal authorities as indicated the will of the corporation. It is not necessary that it be by vote of the people. *Town of Lake vs. Hequembourg*, 325.

NATIONAL BANK—See BANKRUPTCY, 10-14.**NAVIGATION—See ADMIRALTY, 8-11.****NEGLIGENCE.**

1. **CONTRIBUTORY NEGLIGENCE.**—The common law doctrines of con-

NEGLIGENCE—Continued.

tributory negligence do not apply to admiralty law. *McCord vs. Steamboat Tiber*, 409.

2. **ELECTION OF REMEDY.**—The sufferer has his election to sue at common law or in admiralty, and in either case the law of the forum must prevail. *Id.*

3. **DAMAGES FOR PERSONAL INJURIES**—for permanent spinal injuries to a pilot, disabling him from following his profession, fixed at \$2,500. *Id.*

NOTES, BILLS AND CHECKS—See MUNICIPAL BONDS.

1. **NOTE GIVEN UNDER PRESSURE.**—A note given to the agent of a creditor, under the threat of interference to defeat a proposed compromise, is void in the hands of the payee. *Bullens vs. Blain*, 23.

2. **GUARANTOR—WHEN CANNOT PROVE DEBT.**—The guarantors of a note, the holder of which had forfeited his claim against a bankrupt estate, have no right to prove against the estate, their liability having already been discharged by the act of the principal. *In re Ayers*, 48.

3. **PARTICEPS CRIMINIS.**—If the guarantors participated in the act by which their principal forfeited his claim, they occupy no better position, and cannot prove. *Id.*

4. **PREFERENCE—RELEASING GUARANTOR.**—Where the holder has taken a preference, in fraud of the Bankrupt Act, and a recovery has been had against him by the assignee, payment of the judgment does not revive his right to prove against the estate; and by such preference he has released the guarantors, and they have no claim against the estate. *Id.*

5. **REVIVING LIABILITY.**—*It seems*, that a guarantor, not legally liable to the holder, cannot, by any subsequent promise, revive the liability of the estate. *Id.*

PARTNERSHIP—See BANKRUPTCY, 77, 84-85.

1. **BOND BY PARTNERS—DISTRIBUTION.**—A claim on a bond signed individually by the members of a firm, but not for a firm debt or obligation, is not entitled, as against partnership creditors, to be paid in bankruptcy from the partnership assets. It is a joint, but not a partnership debt. *In re Roddin vs. Hamilton*, 377.

PATENTS.

1. **TUCK CREASERS—FULLER'S INVENTION.**—He did not invent the notch and blade, nor the springs: he only invented their application to the sewing machine. Nor can he claim the power of the needle-bar in its various applications, but only the special mechanism which he devised in its application to the sewing machine. *Fuller vs. Yentzer*, 203.

2. **PROTECTION TO PATENTEE.**—A patentee should be protected from any subsequent device which comes fairly within the principle of his invention, but an invention should not be extended beyond the legitimate bounds of the discovery, so as to exclude other inventions within the same field of operations. *Id.*

PATENTS—*Continued.*

8. DIFFERENT DEVICE.—The fact that patentee's device forms a crease by the notch and blade and pincers, does not prevent others from forming a crease by some other device. *Id.*
4. YENTZER AND SCATES PATENT.—If there is a substantial difference between their device and that of the Fuller and Rose patents, there is no infringement. *Id.*
5. UNITY OF ADJUSTMENT.—The Rose patent does not cover every form of mechanism by which a creaser is adjusted to a sewing machine; but must be limited to the mechanism particularly described. *Id.*
6. The first and second claims of the Rose patent are substantially the same: one describes the device, the other the method. *Id.*
7. GOODRICH PATENT.—His combination of lever and spring with the tuck-marker is substantially different from any patented by Rose, and not an infringement. *Id.*
8. RESTRICTING CLAIM.—Patentees should be limited to the claims of their patents, descriptions and particular mechanisms and devices. *Id.*
9. Novelty of defendant's patent not discussed. *Id.*
10. OBJECT OF THE RECORDING ACT.—The object of the 11th section of the act of Congress of 1836, requiring assignments of interest in patents to be recorded within three months, being for the protection of *bona fide* purchasers without notice of previous assignments, a conveyance by a patentee of a right under the patent is valid, as between the parties, without being recorded. *Turnbull vs. Weir Plow Co.*, 225.
11. SUBSEQUENT ASSIGNMENT OPERATIVE ON RESIDUARY INTEREST.—Where a patentee conveys all his right, title, and interest in the patent in a particular territory, and has previously parted with some interest under the patent in a portion of the same territory, the second assignment will be held to operate only upon the residuary interest of the patentee, after having made the previous assignment, even though the first assignment be not recorded until after the second. *Id.*
12. CONSTRUCTION OF SECOND CONVEYANCE.—Where the patentee has any remaining interest in the patent upon which a second assignment can be said fairly to operate, and the second assignment purports to convey only his existing interest, it will not be construed as showing an intention on the part of the assignor to convey what he had previously conveyed. *Id.*
13. THE CASE STATED.—Complainants, in a bill to enjoin the infringement of a patent and for an account, claim title under assignments from the patentee, executed in 1860, of the right under the patent for the counties of Warren and Henderson in Illinois. Defendant claims under an assignment from the patentee, executed in 1870, of all his right, title and interest in the patent in certain territory, including Illinois, which assignment was first recorded. *Held*, that the first assignment is operative, though not recorded until after the

PATENTS—Continued.

- second, and that a plea to the bill setting up the second assignment in bar of complainant's right of action should be overruled. *Id.*
14. **RECORDING ACT OF 1870 CONSTRUED.**—The provisions of the 36th section of the act of Congress of 1870, with regard to the recording of assignments of patents, are substantially identical with those of the 11th section of the act of 1836, as construed by the courts. *Id.*
15. **RE-ISSUE—EXTENDING CLAIM.**—Under the patent laws from 1836 to 1861, a patentee can claim in a re-issue whatever clearly appears to have been a part of his original invention as then shown or described, either by his drawings, specifications or models. *Calkins vs. Bertraud*, 494.
16. The locating the joint, forward of the evenner in a cultivator beam, is a patentable feature, as it produces new and useful results. *Id.*
17. Julius Gesber's re-issue of April 26, 1870, for "improvement in cultivators," original patent granted April 24, 1860, construed and held valid. *Id.*
18. **CERTAINTY IN CLAIM FOR PATENT**—need only be such as will enable a person of skill who understands the result to be attained, to construct a machine embodying the principle. *Id.*

PLEADING—See PRACTICE.

1. **PLEADING PENDENCY OF SUIT IN BAR.**—The pendency of a suit in a court of general jurisdiction in another state, in which property sufficient to satisfy the demand had been attached, is a bar to a second suit in this court. *Lawrence vs. Remington*, 44.
2. The rule in some courts that the pendency of an action in a foreign jurisdiction is not pleadable in abatement, does not apply where the plaintiff has secured his debt by attachment in such action. *Id.*
3. **JUDGMENT IN ANOTHER STATE—ESTOPPEL.**—In assumpsit upon a promissory note, the bar of a judgment in another state upon the same note is not avoided by the record of an action upon that judgment to which the defendant pleaded *nil tiel record*, and in which action plaintiff took a non-suit. The plea of the judgment is good, there is no estoppel, and the second record is not admissible in evidence. *Michigan Insurance Bank vs. Eldred*, 370.
4. **ESTOPPELS.**—Doctrine of estoppels considered. *Id.*
5. **PLEA OF JUDGMENT IN ANOTHER STATE.**—It is a good plea that since the commencement of a suit, judgment was recovered between the same parties in another federal court upon the same cause of action. It is immaterial which suit was first commenced. *U.S. vs. Dewey*, 501.

POST ROUTES—See RAILROAD COMPANY, 1.**PRACTICE—See BANKRUPTCY—REMOVAL FROM STATE COURTS—REVENUE LAW.**

1. **JURISDICTION.**—A national bank cannot be sued in the federal courts outside of the district where it is located. Service on the cashier

PRACTICE—Continued.

- when found within another district does not give jurisdiction. *Main vs. Second National Bank of Chicago*, 26.
1. *Manufacturers' National Bank vs. Baack*, 8 Blatchford, 137, approved.
 3. The Practice Act of June 1, 1872, does not change this rule nor enlarge the jurisdiction of the federal courts. *Id.*
 4. **FORCIBLE ENTRY AND DETAINER.**—Since the Illinois statute of February 16, 1874, the U. S. Circuit Courts in that state have in proper cases jurisdiction of actions of forcible entry and detainer. *Wheeler vs. Bates*, 88.
 5. Such action is a "suit of a civil nature" within the meaning of the act of Congress of 1789. *Id.*
 6. **ERROR IN CHARGE.**—Where error in a charge relates to a matter which might have been corrected on the spot, if the attention of the court had been called to it, the party failing so to do cannot take advantage of the error on motion for new trial. *Hamlin vs. Pettibone*, 167.
 7. **REMEDY AGAINST TRUSTEE.**—The remedy of the *cestui que trust* against the trustee for negligence must be in equity, not at law. *Hukill vs. Page*, 183.
 8. **POWER OF COURT OVER JUDGMENT**—to set aside, modify or annul, is unlimited during the term at which they were rendered. *Union Trust Co. vs. R. R. I. & St. L. R. R. Co.*, 197.
 9. Where a demurrer to a bill is sustained and bill dismissed, the court may, during the term, set aside its dismissal and restore the case without losing its jurisdiction, and a state court cannot, by taking jurisdiction during this interval, oust or supersede the jurisdiction of this court. The case stands precisely as though no order of dismissal had been made. *Id.*
 10. **REFUSAL TO RESUME JURISDICTION.**—The cases where courts have refused to set aside their judgment and proceed with the case, in order to protect their parties acting in good faith, are cases of equitable discretion, not of right, and do not contravene the rule. *Id.*
 11. **INFORMATION—SEIZURE ESSENTIAL TO JURISDICTION.**—In cases of information an actual seizure of the *res*, prior to the filing of the libel, is essential to the jurisdiction of the federal courts. *The Tug May*, 243.
 12. United States Statutes and decisions of the Supreme Court commented upon. *Id.*
 13. **SEIZURE, WHO SHOULD MAKE.**—The Secretary of the Treasury may authorize any United States officer to make the seizure; and in the absence of such authority, it is the duty of the customs officers. *Id.*
 14. **FORFEITURE OF FRANCHISE.**—The court will not forfeit the franchise of a corporation on the application of individuals; the right belongs to the state alone. *Gaylord vs. Ft. Wayne, M. & C. R. R. Co.*, 286.
 15. **PRACTICE.**—But if a bill prays for a receiver and general relief, the court will retain the bill for that purpose; a forfeiture of the fran-

PRACTICE—Continued.

- chise is not essential to the power of appointing a receiver. *Id.*
16. **CONFLICT OF JURISDICTION.**—The court which first takes jurisdiction of a controversy and the parties, is entitled to retain it to its final termination, and also to take possession of the *res*, subject of the controversy, exclusive of all interference, from any other court of concurrent jurisdiction; and it is not essential that the court first taking jurisdiction of the controversy should also first take the actual possession of the *res*. *Id.*
17. **PRIORITY OF POSSESSION.**—If a receiver appointed by another court on bill filed pending this controversy, takes prior possession of the *res*, his possession is wrongful and should give way to the prior jurisdiction of this court. *Id.*
18. **AMENDMENTS.**—The fact that the allegations of the bill were imperfect, and a demurrer was sustained, with leave to amend, does not change the fact of jurisdiction; as the amendments relate back to, and become part of, the original bill. *Id.*
19. **LIS PENDENS.**—This doctrine does not apply to such a case. *Id.*
20. **REDUCING DEMAND TO JUSTICE'S JURISDICTION.**—In Indiana, a plaintiff may reduce his demand to bring it within the jurisdiction of a justice of the peace. *Witt vs. Hereth*, 474.
21. **LIEN OF EXECUTION IN BANKRUPTCY.**—The lien of an execution will be respected by the bankruptcy court, though the plaintiff sued out his execution immediately upon the rendering of the judgment, and the defendant filed his bankruptcy on the same day. The creditor has a right to follow all the remedies which the law gives him. *Id.*
22. **PRACTICE.**—Affidavits, evidently intended to be used in a case, but not entitled in it, will be allowed to be read on motion for an injunction. *Shook vs. Rankin*, 477.

PREMIUM—*See* INSURANCE, 1-3.

PROMISSORY NOTES—*See* BILLS, NOTES AND CHECKS.

PUTS—*See* WAGER CONTRACTS.

RAILROAD COMPANIES—*See* CONSTITUTIONAL LAW, 7-10.

1. **RIGHTS OF TELEGRAPH COMPANY ON RAILROAD RIGHT OF WAY.**—Neither the acts of Congress declaring railroads to be post-roads, nor the act of July 24, 1866, providing that the telegraph companies may construct their lines over post-roads, authorize a telegraph company to establish its lines over the right of way of a railroad company without making compensation therefor according to law. *A. & P. Telegraph Co. vs. C., R. I. & P. R. R. Co.*, 158.
2. **CONSTITUTIONAL LAW.**—It is beyond the power of Congress to authorize a telegraph company to construct its line over private property without making compensation. *Id.*
3. **RAILROAD CROSSING AT GRADE.**—Where the state Legislature has not prescribed in what manner one railroad shall cross another, a court

RAILROAD COMPANIES—Continued.

of equity has jurisdiction in a proper case, to control the matter. *O. & N. W. R. R. Co. vs. O. & P. R. R. Co.*, 219.

4. In Illinois, the policy of state legislation is to allow a new railroad, in most instances, to cross another road at grade; but if a new road can at small expense, cross the old one at a different level, a court of equity should require it to do so, especially if a grade crossing is dangerous to life and property. *Id.*
5. The additional expense may, however, be apportioned between the roads, as in such case the old road has no vested absolute rights to control the new. *Id.*
6. JURISDICTION.—A corporation created by the laws of another state, although associated with one of this state, and having common interest with it, is entitled to file a bill in this court and claim its protection. *Id.*
7. FORFEITURE OF FRANCHISE.—The court will not forfeit the franchise of a corporation on the application of individuals; the right belongs to the state alone. *Gaylord vs. Ft. Wayne, M. & O. R. R. Co.*; 286.
8. PRACTICE.—But if a bill prays for a receiver and general relief, the court will retain the bill for that purpose; a forfeiture of the franchise is not essential to the power of appointing a receiver. *Id.*

RECEIVER—See JURISDICTION, 5—BANKRUPTCY, 10-12.

REMOVAL FROM STATE COURT—See CONFLICT OF JURISDICTION.

1. JURISDICTION—CERTIORARI.—The United States Circuit Court has no jurisdiction of a writ of *certiorari* to a state court for the removal of proceedings by the state against a railroad company under the Illinois act of May 2, 1873. *State of Illinois vs. O. & A. R. R. Co.*, 107.
2. Act of Congress of March 3, 1875, construed. *Osgood vs. O., D. & V. R. R. Co.*, 330.
3. This act consolidates and repeals all previous general acts of Congress on the subject. *Id.*
4. REMOVAL FROM STATE COURT.—Since its passage a defendant, though a citizen of the state where the suit is brought, may remove the case from the state to the Federal Court. *Id.*
5. CO-DEFENDANTS.—Petitioners may have a removal though their co-defendants do not join in the petition, if the controversy is wholly between them and the plaintiff, and can be fully determined as between them; and such a case arises where a bill is filed by a bondholder of a railroad company, and the company, its officers and the trustees under its mortgages petition for removal. *Id.*
6. JUDGMENT CREDITORS—CROSS BILL.—The existence of judgment creditors and the fact that one of them has filed a cross-bill, does not affect the right of removal. *Id.*
7. SEIZURE OF RES BY A STATE COURT does not affect the case, for that is necessarily transferred with the case. *Id.*

REMOVAL FROM STATE COURT—*Continued.*

8. COLLATERAL ISSUES connected with the *res* in the state court do not destroy the right of removal, provided the parties are within the statute. *Id.*
9. VACATION.—The petition and bond may be filed in the state court during vacation, and may be sufficient, though there was no action upon the petition or bond. *Id.*
10. IRREGULARITIES IN THE REMOVAL do not vitiate it, nor authorize the Federal Court to remand or dismiss it; if it has jurisdiction, it should retain it. *Id.*
11. RECORD—CERTIFICATE.—It is not essential that the record be certified by the judge of the state court; the attestation of the clerk under the seal of the court is sufficient. *Id.*
12. VERIFICATION.—It is not necessary that the petition for removal be verified by affidavit. *Id.*
18. When the petition and bond are filed in the state court during vacation the jurisdiction of that court ceases; it does not remain until the court can act upon them in term time; and it is not for the state court to decide, whether a proper case is made. *Id.*
14. CONDEMNATION PROCEEDINGS—JURISDICTION.—A proceeding under the right of eminent domain to condemn land for a railroad is not a case in which the state is a party; and the federal courts may have jurisdiction. Nor is it a special proceeding, nor can the right of removal be limited by state laws. It is in effect a suit of civil nature, and if the parties are competent, comes under the United States statutes for removal of causes. *Warren vs. Wisconsin Valley R. R. Co.*, 425.
15. WISCONSIN STATUTE PROHIBITING NON-RESIDENT CORPORATIONS FROM REMOVING SUIT INTO FEDERAL COURTS.—The Wisconsin statute of March 14, 1870, that no non-resident corporation should remove a suit from the state to the Federal courts, having been declared unconstitutional by the United States Supreme Court, the provision of the statute of April 5, 1872, requiring the Secretary of the State to revoke the license of any such corporation applying for such removal falls with it. *Hartford Fire Insurance Co. vs. Doyle*, 461.
16. JURISDICTION OF UNITED STATES CIRCUIT COURT.—The United States Circuit Court can in such case grant an injunction restraining the Secretary of State from attempting to forfeit the license. *Id.*
17. PARTIES.—Where the real controversy is between a city and one of its citizens, a citizen of another state, claiming to be interested in the subject matter of the litigation, has not the right to remove the suit from the state into the federal court. *City of Chicago vs. Gage*, 467.
18. ANOTHER SUIT IN STATE COURT.—The existence of a suit by stockholders of a railroad company, and even possession by trustees under the order of the state court therein, do not affect the right to re-

REMOVAL FROM STATE COURT—Continued.

move into the federal court a suit brought by bondholders under a deed of trust, which is paramount to the rights of the stockholders; and the possession must follow into the federal court. *Scott vs. O. & S. R. R. Co.*, 529.

19. **TERM FOR REMOVAL.**—The term at which a cause could be first tried, within the meaning of section 8, of the act of March 8, 1875, is the term at which the issues are first made up, the party applying for removal not having been guilty of negligence. *Id.*
20. A *certiorari* is not necessary where the record of the state court is already before the federal court. *Id.*

RENEWAL—See INSURANCE.**REVENUE LAW.**

1. **CONSPIRACY** under the revenue act of March 2, 1867, is a combination between two or more persons to effect the purpose declared by the act to be illegal. The agreement may be expressed or implied, and the gist of the offense is the illegal conspiracy, the particular manner in which it was done, or to be done, not being material. *U. S. vs. Rindskopf*, 259.
2. It is not essential that any but the leading conspirator know the exact part which another was to perform. *Id.*
3. **TWO CONSPIRATORS SUFFICIENT.**—If two are shown to have conspired, the acquittal of others jointly indicted does not prevent the conviction of such two. *Id.*
4. The fact that the overt acts charged and proven were severally criminal, is no answer to an indictment for conspiracy, and an overt act, in itself criminal, may be proven, to show the existence of the conspiracy charged. *Id.*
5. Many cases cited and commented upon. *Id.*
6. **PLACE OF TRIAL.**—The defendants may be tried in any district where the overt acts were committed. *Id.*
7. **GOVERNMENT CONTROL OVER DISTILLERIES.**—The Government has, under the revenue laws, the right to control and regulate the manufacture of spirits, for the purpose of the collection of its revenue. *U. S. vs. Mason*, 350.
8. **RIGHT TO EXAMINE BOOKS.**—The Government has the right to examine all books kept by a distiller or rectifier pertaining to his business—his private books as well as those required by law. Such examination should be made by order of the court, and in the presence of the party or his counsel. *Id.*
9. **PRIVATE BOOKS.**—If the private books show a different state of facts from that shown by the books kept for the Government, they may be treated as Government books also. *Id.*
10. **OPENING VAULTS.**—If the distiller refuses to produce his books, the court may order the vaults containing them to be opened by its officers. *Id.*
11. It is not necessary to specify the books, but the officers may take all

REVENUE LAW—*Continued.*

- books found on the premises, the presumption being that they belong to the distilling business. *Id.*
12. FORFEITURE AGAINST DISTILLERY.—A proceeding against a distillery for forfeiture under the revenue laws, is not a criminal proceeding within the meaning of the Constitution. *U. S. vs. Three Tons of Coal*, 879.
 13. The true test is, whether the judgment is of punishment, against the person, or of forfeiture against the *res*. *Id.*
 14. Section 860 of the United States Revised Statutes is modified and partially repealed by the act of June 23, 1874. *Id.*
 15. CONSTRUCTION.—The Revenue law is not, properly speaking, a penal statute to be construed with strictness in favor of the defendant. *Id.*
 16. If the legislative protection against a witness' evidence being used against himself, is as broad as the constitutional provision against compelling a person to criminate himself, he can be compelled to answer. *Id.*
 17. POWER OF GOVERNMENT.—The complete superintending control of the business of distillers and rectifiers is exercised by the Government, and when they enter the business they contract to submit to this Governmental surveillance. *Id.*
 18. PERSONAL AND CONSTITUTIONAL RIGHTS.—It is no infringement of personal or constitutional rights for the government, under the act of June 23, 1874, to require the production of, and, if necessary, seize any or all the books and papers kept by them in their business. They are not such private property as to be exempt from seizure and search, nor are they protected by the rules against obtaining from a party, evidence to be used against himself. The Government has really an interest in such business, as affecting the public revenue. *Id.*
 19. The discretion of the court in requiring books and papers to be produced, should not be exercised in favor of the claimants, when no special circumstances are shown by them. *Id.*
 20. CERTAINTY OF DESCRIPTION.—The books and papers are not required to be more specifically described than as those used and kept in their business as distillers or rectifiers, between certain dates named. *Id.*
 21. PRESENCE OF CLAIMANTS.—The claimants and their counsel have the right to be present at the examination of their books and papers. *Id.*
 22. Many cases cited and commented upon. *Id.*
 23. ACT OF JUNE, 1874.—The act of June 23, 1874, does not apply exclusively to cases arising under the custom revenue laws, but applies as well to cases arising under the internal revenue laws. *U. S. vs. Distillery No. 28*, 483.
 24. CONSTITUTIONALITY OF ACT.—The fifth section of the act of June 23,

REVENUE LAW—Continued.

- 1874, is constitutional, and does not violate articles 4, 5 and 7, of the amendments to the Constitution. *Id.*
25. **PROCEEDING AGAINST DISTILLERY.**—This is a proceeding against the distillery and not against the claimants; any statements made by them as witnesses in the proceeding against the distillery could not be used against them in any subsequent criminal prosecution. *Id.*
26. **PRODUCTION OF BOOKS.**—The court had the power to make the order requiring the production of the books and papers, and to enforce it. *Id.*
27. **JURY TRIAL.**—That when the issues are made up, the claimants will have the constitutional right to demand a jury trial. *Id.*
28. **THE PENALTY.**—The penalty for not complying with the order to produce books is that the allegations in the motion shall be taken as confessed. *Id.*
29. **EX POST FACTO LAW.**—The objection that the act of 1874 is an *ex post facto* law considered. *Id.*

SECRET AGREEMENT—See COMPROMISE AGREEMENT.

SET-OFF—See BANKRUPTCY, 87.

STOCK NOTE—See BANKRUPTCY, 87.

TAXES AND ASSESSMENTS—See ADMIRALTY, 9-13.

TELEGRAPH COMPANY—See RAILROAD COMPANIES, 1-2.

TOWN OFFICERS—See MUNICIPAL BONDS, 6-7.

TRUSTEE.

REMEDY AGAINST TRUSTEE.—The remedy of the *cestui que trust* against the trustee for negligence must be in equity, not at law. *Hukill vs. Page*, 183.

TRUST FUND—See BANKRUPTCY, 71.

WAGER CONTRACT.

1. **PUBLIC POLICY.**—"Puts," or the privilege for a nominal consideration of delivering a large quantity of grain within a certain time at a specified price, when taken of parties notoriously running a "corner," are wager contracts, and void as against public policy. *Ex parte Young*, 53.
2. **SETTLING DIFFERENCES.**—Where no delivery of the grain was contemplated by the parties, but they expected simply to settle the differences as established by the future prices, the contract is simply a wager, and therefore void. *Id.*
3. **VOID UNDER GAMING STATUTES.**—These "puts" are also within the Illinois statute concerning gaming, and the English decisions under 8 and 9 Victoria, are applicable as authorities. *Id.*
4. **INADEQUACY OF CONSIDERATION.**—Claims against an estate for \$400,000, founded on a consideration of less than \$19,000, are grossly inequitable and unjust, and should not be allowed. *Id.*

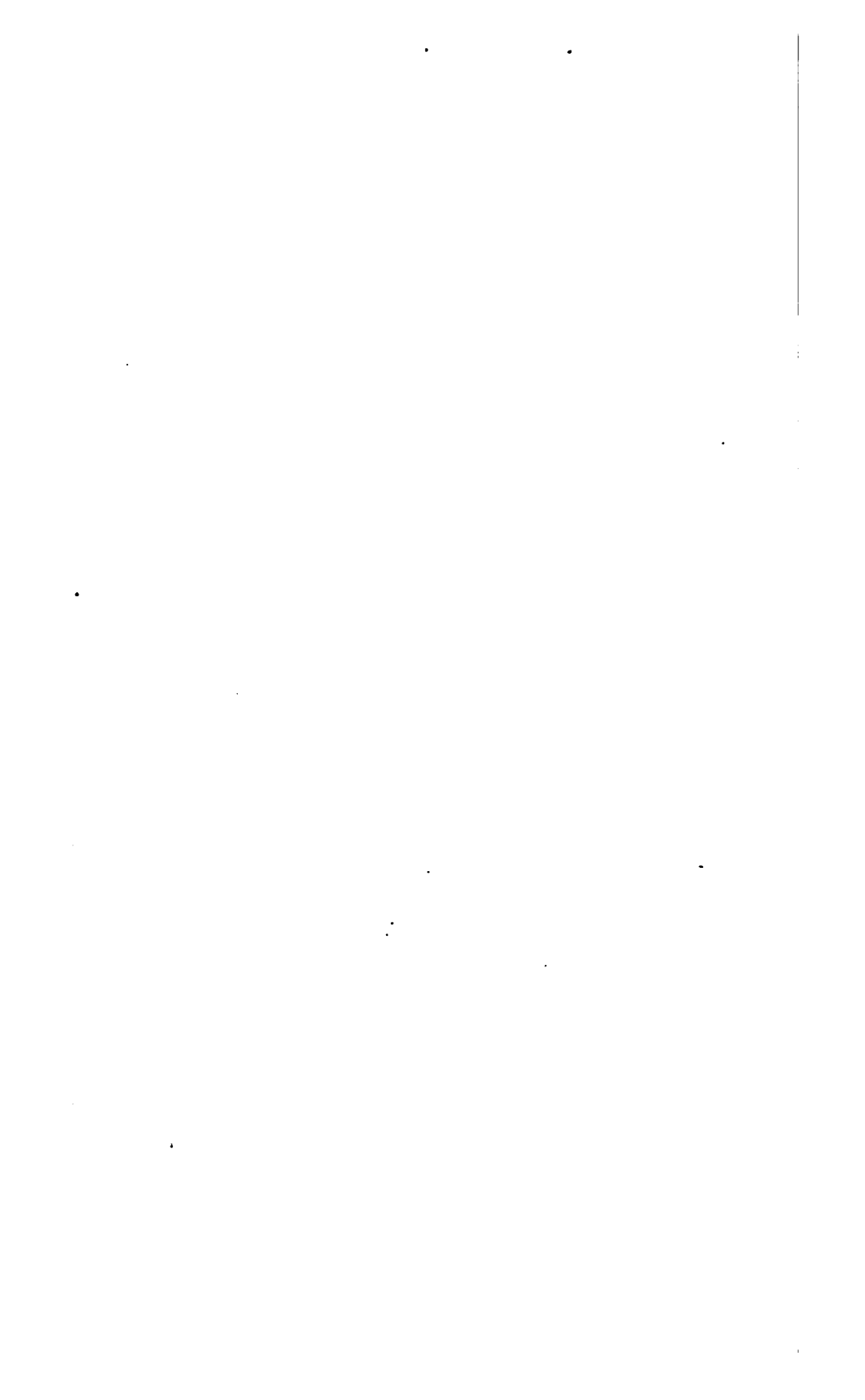
WAGER CONTRACT—Continued.

5. The "put" cannot be sustained, as being a measure of insuring prices when such is not shown to have been the intent of the parties. *Id*
6. Money actually paid on these "puts" may be proved as claims against the estate. *Id.*

WAIVER—See INSURANCE, 1-3—BANKRUPTCY, 88.

WAIVER OF PROOFS.—If the adjuster of an insurance company, after examining the premises, stated to the insured that the company was not liable, on the ground of the invalidity of the policy, such facts may be considered as a waiver of the proofs of loss. *Field vs. Insurance Co., of N. A.*, 121.







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